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No. 10932

2402

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the
Estate of El Camino Refining Company, STATE OF
CALIFORNIA and UNIVERSAL CONSOLI-
DATED OIL COMPANY,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

FEB 24 1944

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States
Southern District of California

Central Division

No. 40599 BH

In Proceedings for the Reorganization of a Corporation
Under Chapter X.

In the Matter of

EL CAMINO REFINING COMPANY,

Debtor.

PETITION

To the Honorable Judges of the District Court of the
United States, for the Southern District of California:

The petition of El Camino Refining Company respectfully represents:

I

That your petitioner is unable to pay its debts as they mature.

II

That your petitioner is a corporation organized and existing under the laws of the State of California and is a corporation which could become a bankrupt under the Act of Congress relating to Bankruptcy and is not a municipal, insurance, or banking corporation, or a building and loan association, or a railroad corporation authorized to file a petition under §77 of said Act.

Your petitioner now has, and for the six (6) months next preceding the filing of this petition, has had its principal assets and place of business near Los Alamitos, in

the County of Orange, State of California, within the territorial jurisdiction of this Court.

III

The nature of the business of your petitioner is the operation of an oil refinery which is engaged in the refining of petroleum [2] products.

IV

That the assets, liabilities, capital stock and financial condition of your petitioner are as follows:

(a) Assets. The assets of your petitioner as of May 8, 1942, consisted of cash on hand, accounts and contracts receivable, merchandise inventory, stocks and other investments, land, and refinery furniture, fixtures and equipment, all of an aggregate fair value of One Hundred Twenty-Five Thousand (\$125,000.00) Dollars.

(b) Liabilities. The liabilities of your petitioner, exclusive of its capital stock, as of May 8, 1942, consisted of:

(1) Accounts Payable	\$15,184.29
(2) Notes Payable in favor of the Universal Consolidated Oil Co., and secured by a Mortgage on the principal assets of this corporation	8,000.00
(3) Contracts payable	875.33
(4) Accrued Compensation and Liability Insurance	42.64
(5) Reserve for F.O.A.B.	80.54
(6) Reserve for State and Federal Unemployment Commission	180.93
(7) State Gasoline Tax Payable	7,193.52
(8) Federal Gasoline Tax Payable	39,498.99
(9) Sales Tax Payable	1.78

(c) Capital Stock. Your petitioner has an authorized capital stock of five hundred thousand (500,000) shares of the par value of \$1.00 per share, of which seventy-one thousand, five hundred five (71,505) shares are issued and outstanding.

(d) Financial Condition. Your petitioner has insufficient cash with which to pay its past due obligations.

The United States Government has agreed to an amortized plan of payment of its claim on account of unpaid gasoline sales tax but your petitioner is unable to meet the payments required by the [3] Government, and it is unable to pay its gasoline tax to the State of California.

V

There are no proceedings pending affecting the property of your petitioner known to it other than a possible lien that may have been placed against said property for unpaid gasoline sales tax due the United States.

VI

No plan of reorganization, readjustment, or liquidation affecting the property of your petitioner is pending either in connection with or without any judicial proceeding.

VII

The specific facts showing the need for relief under Chapter X of said Act are as follows: Your petitioner is solvent, for your petitioner has assets of a value considerably in excess of its total liabilities. The declaration of war by our Government terminated petitioner's export business, and the subsequent rationing of tires resulted in a curtailment of its domestic business. Your petitioner can provide for the refining of fuel oil, and production of

an aviation gasoline of good quality. In view of the public announcement of a possible shortage of fuel oil, and also in view of the fact that many of the large oil refineries in California are located very near the coast line and are vulnerable from bombing attacks as well as sabotage on the part of our enemies your petitioner feels that its plant should be preserved as a going business and as a vital defense plant during the period of this emergency. Pending an acquisition of the plant by the Government for war purposes, or pending the securing of any Government contracts for petroleum products your petitioner is reasonably certain, from past experience, that this plant can be operated at a profit by the elimination of certain overhead expenses and confining its production efforts to the making of kerosene, which is a rather simple process. [4]

While no plan of reorganization has been prepared, your petitioner is convinced that a plan can be evolved which will preserve the plant of your petitioner as a going business and which will inure to the benefit of its creditors and stockholders.

The specific facts showing why adequate relief cannot be obtained under Chapter XI of said Act are as follows: Your petitioner cannot be reorganized without a reduction, extension, or other satisfactory adjustment of its secured and preferred indebtedness.

VIII

Your petitioner desires that a plan of reorganization be effected for it under and pursuant to Chapter X of said Act.

IX

The indebtedness of your petitioner, liquidated as to amount and not contingent as to liability, is less than Two Hundred Fifty Thousand (\$250,000.00) Dollars.

X

No other petition by or against your petitioner is pending under Chapter X of said Act, nor is any other bankruptcy proceeding initiated by a petition by or against your petitioner, now pending.

XI.

The officers of your petitioner are: J. Vernon Pohl, President; Earl Whitehead, Secretary, and Robert Raff, Treasurer, and the said officers named now constitute the Board of Directors. The only salaries being paid to officers of the corporation are as follows: J. Vernon Pohl \$350.00 per month; Robert Raff \$225.00 per month

XII

That attached hereto, marked Exhibit "A" and made a part hereof, is a certified copy of a Resolution of the Board of Directors of your petitioner authorizing the filing of this petition.

Wherefore, your petitioner prays: [5]

(a) That an Order be entered herein approving this petition;

(b) That the debtor be continued in possession of its property and that it have all the title, be vested with all

the rights, be subject to all the duties, and exercise all the powers of a Trustee appointed under Chapter X of the Bankruptcy Act, subject, however, at all times to the control of the Judge and to such limitations, restrictions, terms and conditions as the Judge may from time to time prescribe;

(c) That said Debtor in possession be authorized, directed and empowered to operate the business and manage the properties of your petitioner; and

(d) That further proceedings may be had upon this petition in accordance with the provisions of Chapter X of said Act, and that your petitioner have such other and further relief as is just.

EL CAMINO REFINING COMPANY,

By J. Vernon Pohl

President of said Corporation.

Petitioner.

CRAIG & WELLER

By FRANK C. WELLER

Attorneys for Petitioner.

817 Board of Trade Building,

111 West Seventh Street,

Los Angeles, California.

TRinity 5531 [6]

[Verified.] [7]

[Endorsed]: Filed May 12, 1942. [8]

[Title of District Court and Cause.]

ORDER APPROVING PETITION AND CONTINUING DEBTOR IN POSSESSION.

The above named debtor having filed its petition herein verified the 11th day of May, 1942, praying that proceedings be had under Chapter X of the Act of Congress relating to Bankruptcy, and it appearing that no notice of said petition should be given,

Now, upon the consideration of said petition and due deliberation having been had thereon, the Court Does Find:

1. That the indebtedness of El Camino Refining Company, the above named debtor, liquidated as to amount and not contingent as to liability, is less than Two Hundred and Fifty Thousand (\$250,000.00) Dollars; and the Court Is Satisfied and Does Find

2. That the said petition of El Camino Refining Company, said debtor, verified on the 11th day of May, 1942, complies with the requirements of Chapter X of said Act.

3. That the said petition of El Camino Refining Company, said debtor, has been filed in good faith, and it is Ordered, Adjudged and Decreed

4. That said petition be, and it hereby is approved.

5. That pending the further order of this Court, said debtor be, and it hereby is, continued in possession of its property and estate.

6. That said debtor be, and it hereby is, authorized to operate its business and manage its property until such time as this [9] Court shall otherwise prescribe.

7. That without in any way limiting the generality of paragraphs numbered 5 and 6 hereof, and to the extent consistent with Chapter X of said Act, said debtor shall have full power and authority until the further order of this Court;

(a) To employ, discharge and fix the compensation, salaries and wages of all managers, agents, employees, and servants, other than officers, as it may deem necessary and advisable for the proper operation of its business and the management, preservation and protection of its property;

(b) To purchase or otherwise acquire for cash or on credit, such materials, equipment, machinery, supplies, services or other property as it may deem necessary and advisable in connection with the operation of said business and the management and preservation of said property;

(c) To sell merchandise, supplies and other property, both real and personal, and to render services for cash or on credit;

(d) To enter into any contracts incidental to the normal and usual operation of said business and the management and preservation of said property;

(e) To keep the property of the within estate insured in such manner and to such extent as it may deem necessary and advisable;

(f) To collect and receive all rents, issues, income and profits, and all outstanding accounts, things in action and credits due or to become due to the within estate, and to hold and retain all moneys thus received to the end that the same may be applied under this and different or further orders of this court;

(g) To do any and all such things and to incur such other expenses as may be necessary and advisable in the proper management and conduct of its affairs and in the preservation and protection of the property and assets of the within estate; [10]

(h) To institute, prosecute, defend, compromise, adjust, intervene in and become a party to such other actions or proceedings in law or in equity, in state or federal courts, as may in its judgment be necessary or advisable for the protection, maintenance and preservation of the property and assets of the within estate.

8. That until the further order of this Court, said debtor, in its discretion, be, and it hereby is, authorized to pay from time to time out of any and all funds now or hereafter coming into its hands and available for such purposes:

(a) All taxes and similar charges lawfully incurred in the operation of its business and the preservation and maintenance of its property and assets since the filing of said petition;

(b) All proper expenses and obligations incurred by it on or after the date of this order in operating its business and preserving and maintaining the property and assets of the within estate, as herein authorized, including among other expenses and obligations, the reasonable wages, salaries, and compensation of all managers, agents, employees, and servants, other than officers employed by it;

(c) The cost of maintaining its corporate existence, including necessary expenses for the preservation of records;

(d) The expense of printing, typing, or mimeographing, and mailing and of publishing notices to creditors,

stockholders and all other parties in interest of proceedings taken hereunder.

9. That until the further order of this Court, said debtor be, and it hereby is, authorized and empowered to employ its officers and pay such officers at the following rate of compensation:

J. Vernon Pohl, President, \$350.00 per month

Robert Raff, Treasurer, \$225.00 per month

10. That said debtor shall close its present books of account as of the close of business on the date of the entry of this order, and shall open new books of account as of the opening of [11] business on the next succeeding business day, in which new books of account it shall cause to be kept proper account of its earnings, expenses, receipts, disbursements and all obligations incurred and transactions had in the operation of its business and the management, preservation and protection of its property; and said debtor may withdraw monies from its depositories or depository as required for the proper conduct and maintenance of its business and preservation and protection of its property, as herein authorized, by check signed by such officers as are now so duly authorized by its Board of Directors, and said debtor shall preserve proper vouchers for all payments made on account of such disbursements.

11. That on or before the 29th day of May, 1942, said debtor shall, at the expense of the estate, prepare, make oath to and file in this court:

(a) A schedule of its property showing the location, quantity and money value thereof;

(b) A schedule of its creditors of each class, showing the amounts and character of their claims and securities,

and, so far as known, the name and post office address or place of business of each creditor; and,

(c) A schedule of its stockholders of each class, showing the number and kind of shares registered in the name of each stockholder, and the last known post office address or place of business of each stockholder.

12. That said debtor shall give notice to the Securities and Exchange Commission in the form of a brief statement of all steps taken in connection with this proceeding, as required by §265 of said Act.

13. That June 29th, 1942, at 10 o'clock A.M., Court Room 6 in the Federal Building, Temple and Spring Streets, Los Angeles, California, be, and it hereby is, fixed as the time and place for the hearing of objections to the continuance of said debtor [12] in possession.

14. That on or before the 30th day of June, 1942 said debtor shall petition the Judge to fix a time within which a plan of reorganization for El Camino Refining Company, the above named debtor, may be filed and proposed in this Court, and a subsequent time for a hearing on such plan and for the consideration of any objections or amendments thereto.

15. That until final decree or the further order of this Court, all creditors and stockholders, and all sheriffs, marshals, and other officers, and their respective attorneys, servants, agents and employees, and all other persons, firms, and corporations be, and they hereby are, jointly and severally, enjoined and stayed from commencing or continuing any action at law or suit or proceeding in equity against said debtor in any court, or from executing or issuing or causing the execution or issuance out

of any court of any writ, process, summons, attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with or enforcing a lien upon any property owned by or in the possession of the said debtor, and from doing any act or thing whatsoever to interfere with the possession or management by said debtor of the property and assets of the within estate, or in any way interfere with said debtor in the discharge of its duties herein, or to interfere in any manner during the pendency of this proceeding with the exclusive jurisdiction of this court over said debtor and its property; and all persons, firms or corporations owning any lands or buildings occupied by said debtor or wherein is contained any property of the within estate be, and they hereby are jointly and severally, stayed, pending the further order of this Court, from removing or interfering with any such property.

16. That said debtor be, and it hereby is, directed to give notice of the hearing fixed in paragraph numbered 13 hereof at least thirty (30) days prior to June 29, 1942, by mailing such notices [13] to its creditors and stockholders as the same may appear from its records or may be otherwise known to it, to the Secretary of the Treasury at Washington, District of Columbia, and by mailing two (2) copies of such notice to the Securities and Exchange Commission by registered first class mail, postage prepaid, addressed to it at Washington, District of Columbia, or at such other place as the Securities and Exchange Commission shall designate by written notice filed in this proceeding, and served upon the parties to this proceeding, such notice to be in substantially the form set forth in Exhibit "A" attached hereto and made a part hereof.

17. That this Court reserves full right and jurisdiction to make at any time and from time to time such Orders for the purpose of vacating, amplifying, extending, limiting, or otherwise modifying this Order, as the Court shall deem proper.

Dated: May 12, 1942.

Ben Harrison

District Judge [14]

[Endorsed]: Filed May 12, 1942. [15]

[Title of District Court and Cause.]

ORDER ADJUDGING DEBTOR BANKRUPT AND
DIRECTING THAT BANKRUPTCY BE PRO-
CEEDED WITH.

The Court having fixed August 17, 1942 as the time for filing a Plan of Reorganization herein, and said time having been extended by proper order of the Court until the 8th day of March, 1943, and it appearing that no plan has been proposed or filed in this matter within the time prescribed, and it also appearing that no further extension of time for the proposal of plans should be granted, and it also appearing that due notice of this hearing has been given in the manner prescribed by law and that the entry of an Order adjudging the said debtor a bankrupt and directing that bankruptcy be proceeded with is in the interests of creditors and stockholders herein, and it appearing to be the proper case for such an Order;

It Is Hereby Ordered that El Camino Refining Company, the above named debtor, be, and it hereby is adjudged a bankrupt under the Act of Congress relating to Bankruptcy, and [16]

It Is Further Ordered that the bankruptcy of said debtor be proceeded with pursuant to the provisions of said Act, and

It Is Further Ordered that the above entitled proceeding be, and it hereby is referred to Ben E. Tarver, one of the Referees in Bankruptcy of this Court, to take such further proceedings herein as are required and permitted by said Act, and in addition said Referee is invested with jurisdiction to perform such of the duties as are conferred upon courts of bankruptcy, except such as are required by said Act and General Orders in Bankruptcy, to be performed by the Judge, and the said El Camino Refining Company shall henceforth attend before the said Referee and submit to such Orders as may be made by him or by a Judge of this Court relating to bankruptcy.

Dated this 8 day of Mar., 1943.

Ben Harrison
District Judge

Judgment entered Mar. 8, 1943. Docketed Mar. 8, 1943. Book C. O. #14, page 636. Edmund L. Smith, Clerk: by Murray E. Wire, Deputy.

[Endorsed]: Filed Mar. 8, 1943. [17]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

The undersigned referee in bankruptcy, to whom was referred by the court the above-entitled case for administration, respectfully certifies and represents:

I

STATEMENT OF THE CASE

This case was commenced May 12, 1942, under Chapter X of the Bankruptcy Act, for the purpose of the reorganization of the above-named corporation. Reorganization having been shown to be impossible, the court, on March 8, 1943, made an Order, pursuant to Section 236-(2) of the Act, adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of the Act, and, at the same time, referred to the undersigned referee, pursuant to Section 22-a of the Act, the bankrupt's estate generally for purposes of administration. The estate has been before the said referee since that time.

During the course of administration, the property of the estate, real and personal, was liquidated and reduced to cash. The assets of the estate consisted of real and personal property. The real property comprised premises at Los Alamitos, Orange County, California, upon which was located an oil refinery plant. The personal property comprised articles of [18] personalty located upon said oil refinery plant and furniture and fixtures at the office formerly conducted by the bankrupt in Los Angeles. The sum of \$19,927.85 was received from the sale of the oil refinery plant, including both real and personal property.

The sum of \$1,312.50 was received from the sale of the personal property at the Los Angeles office. It was stipulated by the parties in interest that of this sum of \$19,927.85 received from the sale of the oil refinery plant, the sum of \$8,150.00 represented the amount attributable to the value of certain oil tanks and equipment used in connection therewith, asserted by the State of California and the Universal Consolidated Oil Company, a corporation, to be real property affixed to the premises, but, on the other hand, asserted by the United States of America to be personal property and not a part of the realty. It was also stipulated that of said sum of \$19,927.85, the sum of \$1,900.00 was attributable to the value of a cooling tower connected with the oil tanks and other machinery and equipment on the bankrupt's premises, but not located on said premises and situated on the adjoining premises of the Pathfinder Oil Company. It was also stipulated by all parties in interest that the sum of \$273.00 was attributable out of said sum of \$19,927.85 to property which all agreed was personalty located upon the bankrupt's premises. It is conceded that the mortgage held by the Universal Consolidated Oil Company is strictly a real property mortgage, covers real property only, and is insufficient as a chattel mortgage, so that, if the oil tanks and cooling tower, or any of these, are held to be personalty, such personalty is not covered by the lien of the mortgage, or any lien of the State of California, and is subject to any valid liens thereon of the Federal Government.

These sales were made with the consent of the lien [19] claimants hereafter mentioned, with the understanding that the lien claims themselves were transferred from the

property to the proceeds of its sale. The lien claims asserted against these funds were three:

(1) A lien claim of the State of California for unpaid franchise taxes for the calendar years 1939 and 1940, both these years being prior to the commencement of this proceeding. The amount of these state taxes was fixed and determined by the State of California prior to May 12, 1942, the date of the commencement of this proceeding. The bankrupt corporation, prior to bankruptcy, filed protests to the amounts fixed, and thereafter, but subsequent to the commencement of this proceeding, the State of California allowed such protests in part and reduced the amount of the taxes originally fixed and determined.

(2) A lien claim of the Universal Consolidated Oil Company, a corporation, based upon a real property mortgage covering and describing the real property upon which the oil refinery plant was situated. The said mortgage was executed, delivered and recorded prior to the commencement of this proceeding.

(3) Lien claims of the United States Government for unpaid gasoline, income and excess profits taxes. The Federal lien claims for gasoline taxes are based upon assessment lists of the Commissioner of Internal Revenue received by the Collector of Internal Revenue at Los Angeles, California both prior to and subsequent to the commencement of this proceeding on May 12, 1942. The first list was so received by the Collector of Internal Revenue at Los Angeles in October, 1941, subsequent to the accrual of the state taxes, and the execution, delivery and recordation of the real property mortgage above-mentioned. Subsequent to the commencement of the above-entitled proceeding on May 12, 1942, the [20] Commis-

sioner of Internal Revenue's list, carrying an assessment of alleged deficiency income and excess profits taxes for the taxable years 1938 and 1939, were received in the office of said Collector of Internal Revenue. None of these federal lien claims were recorded in the Office of the County Recorder of Orange County, California, where the property affected thereby was located, nor were they filed in the Office of the Clerk of the above-entitled court within whose jurisdiction the said property was situated.

It was conceded by all parties concerned, except as hereinafter noted, that the funds on hand were subject first to the payment of all expenses of administration, fixed and determined by the Referee after due notice and hearing, which arose out of the costs and expenses of the preservation of the property affected by such liens, its liquidation and reduction to cash, the determination of the status and relativity of the liens asserted thereon, and the proper distribution of said cash among the persons entitled thereto. The United States of America reserved the right to contend later that the expenses of administration attributable to property finally determined to be covered by said mortgage, should not in any part be borne by property not covered by said mortgage but which was covered by the tax liens of the United States. It developed during the administration that, after the payment of such expenses of administration, the balance left in the estate would be insufficient to pay all valid lien claims asserted against the fund. It became necessary, therefore, for the referee to determine the relative status of the various lien claims so asserted. After hearings held before the referee, upon notice duly given to all parties in interest, an Order was made by the referee on March 3, 1944, fixing

and determining the relative status of such liens in [21] the following order:

First: The tax liens asserted by the State of California for unpaid franchise taxes which were fixed and determined in the sum of \$3,634.22 as of January 15, 1944, plus interest thereon thereafter at the rate of six percent per annum until paid.

Second: The lien of the real property mortgage held by the Universal Consolidated Oil Company, a corporation, which was fixed and determined in the sum of \$11,-234.78 as of January 15, 1944, plus interest thereon thereafter at the rate of six percent per annum until paid.

Third: All liens held by the United States Government for unpaid gasoline, income and excess profits taxes which might be held herein to be valid. No determination was made as to the validity or amount of such taxes because it developed that the entire estate would be consumed in the payment of the reasonable and proper expenses of administration and the liens held by the State of California and the Universal Consolidated Oil Company above specified.

The Order of the Referee made on March 3, 1944, contains his Findings of Fact and Conclusions of Law upon which the Order is based. For that reason such Findings of Fact and Conclusions of Law are not repeated in this Certificate.

Subsequent to the making of the said Order of March 3, 1944, the United States of America, within the time granted by the Referee, filed with the Referee its Petition for a Review by a Judge of the above-entitled court of the said Order of the Referee of March 3, 1944. This Certificate is in response thereto. With the cooperation

of counsel for the interested parties, the Referee has incorporated in this Certificate a summary of the evidence. Attached hereto and made a part hereof is an approval of the form of this Certificate by such counsel. [22] The testimony was taken down in shorthand by three separate reporters but, on account of sickness, and local and war conditions, it has proven difficult to obtain proper transcripts of this testimony, so it was concluded to present to the Judge the summary of the evidence in lieu of reporter's transcripts, a course which is permissible under Section 39-a-(8) of the Act. There is little, if any, conflict in the evidence. The questions which arise are legal and center around the proper legal conclusions to be drawn from the admitted facts. This Certificate is accompanied by the exhibits received in evidence.

The claim of the State of California for its asserted taxes was filed with the Referee April 3, 1943. The claim of the United States of America for the Federal gasoline taxes was filed with the Referee June 20, 1942. The claim of the Federal Government for deficiencies in income and excess profits taxes was filed with the Referee June 20, 1942. A claim for additional Federal gasoline taxes was filed with the Referee on April 2, 1943. Another claim for additional gasoline taxes was filed with the Referee August 13, 1942. The claims filed by the United States of America do not assert liens upon any particular property but are general in their nature. The claim of the Universal Consolidated Oil Company is set forth in its petition for leave to foreclose mortgage filed herein March 26, 1943.

There are other liens and claims, taxes and otherwise, covered and disposed of by the Referee's Findings of Fact,

Conclusions of Law and Order of March 3, 1944, but none of these are involved in connection with this Petition for Review.

II

QUESTIONS PRESENTED

The United States Government contended before the Referee that the liens asserted by it were superior to and entitled to prior treatment over the liens asserted by the State [23] of California. If this contention were sustained, then Federal tax liens in existence upon the date of the commencement of this proceeding would be subject only to the lien of the Universal Consolidated Oil Company upon the real estate of the bankrupt, which in turn would be subject to the liens of the State of California. Included in this contention were (1) the proposition that the tax liens of the United States were specific, whereas the liens of the State of California were mere general inchoate liens, and (2) that the lien of the real property mortgage of the Universal Consolidated Oil Company did not cover the oil tanks, or the cooling tower, or the admittedly loose personal property on the oil refinery premises, all of which represented the total sum of \$10,323.00 out of the \$19,927.85 received from the sale of the plant. These asserted liens of the Federal Government are based upon the provisions of Sections 3670, 3671 and 3672 of the United States Internal Revenue Code. Section 3671 of such Internal Revenue Code provides, in effect, that Federal liens, such as those here involved, arise at the time the assessment list is received by the Collector of Internal Revenue. Section 3672 of such Internal Revenue Code provides, in effect, that such Federal liens shall not be valid as against any mortgagee, pledgee, purchaser or

judgment creditor, unless notice thereof has been filed for record by the Collector of Internal Revenue in the office of the County Recorder in the county where the property affected is situated, or with the clerk of the United States District Court within whose jurisdiction the property is situated. The liens asserted by the State of California for taxes arise pursuant to the provisions of Section 29 of the Bank and Corporation Franchise Tax Act of the State of California. The said Section 29 provides, in effect, that all such liens attach to the real estate on the first day of the taxable year for which the taxes are levied. [24]

The questions presented by this Review, therefore, center around the following points:

(1) At the time of the commencement of this proceeding on May 12, 1942, were the tax liens of the State of California mere general inchoate liens and not specific liens and, therefore, subordinate to the tax liens asserted by the United States of America, which are asserted by the Federal Government to be specific liens as of May 12, 1942?

(2) Were the oil tanks and the cooling tower, or any of these, personal and not real property, and, therefore, subject to the tax liens asserted by the United States of America and not subject to the real property mortgage held by the Universal Consolidated Oil Company?

III

SUMMARY OF EVIDENCE

1.

On the 12th day of May, 1942, the above-named bankrupt corporation filed herein its petition for reorganization

under Chapter X of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938. The Court thereupon, and on the 12th day of May, 1942, made an Order herein to the effect that said petition was properly filed and was filed in good faith, and continuing the debtor corporation in possession of its assets. Thereafter, and on the 8th day of March, 1943, an Order was made herein adjudicating the said corporation a bankrupt, and referring further proceedings in the administration of its estate to Ben E. Tarver, a Referee in Bankruptcy of this Court. Thereafter, and on the 27th day of March, 1943, Paul W. Sampsell, with the approval of the said Referee, was appointed Trustee in Bankruptcy of said estate, and thereafter and on the 31st day of March, 1943, duly qualified. Ever since said 31st day of March, 1943, the said [25] Paul W. Sampsell has been, and now is, the duly appointed, qualified and acting Trustee in Bankruptcy of said estate.

2.

The assets of the bankrupt estate consisted of real and personal property. The real property comprised premises at Los Alamitos, Orange County, California, upon which was an oil refinery plant. The said real property is described as follows:

Lots 13 to 24 inclusive, Block 12 of the Town of Alamitos, Orange County, California, as shown on map filed in Book 1, Page 25, Records of Surveys, in the office of the County Recorder of said County, excepting therefrom that portion of said lands conveyed to the Southern Pacific Railroad Company by deed recorded January 13, 1897, in Book 29, Page 329 of Deeds, Records of Orange County, California.

It was disputed whether or not the machinery, fixtures and equipment of the plant were personal property or permanent fixtures attached to and a part of the real property.

The admitted personal property comprised:

- (1) Loose Articles not permanently affixed to the said premises as a part thereof; and
- (2) Furniture and fixtures at the office formerly conducted by the bankrupt corporation in Los Angeles.

By the consent of lien claimants, all of this property, real and personal, has been sold under the direction and control of the Court. The said sale has been consummated and the purchase price paid to the Trustee. By the consent of the lien claimants, and with the approval of the Trustee and the Court, all liens claimed upon the said property have been transferred to the funds realized from the sales, subject to such expenses of administration fixed by the Court, after due notice, which arose [26] out of the costs and expenses of the preservation of the property, its liquidation and reduction to cash, the determination of the status and relativity of liens asserted upon said cash, and the proper distribution of such cash among the persons entitled to share in the same. The amount received from the sale of the oil refinery plant was \$19,927.85. This figure of \$19,927.85 includes the proceeds from the sale of all real and personal property located at the refinery plant. Personal property of the bankrupt, located in the Los Angeles office of the bankrupt, was sold by the Trustee, at a separate sale for \$1,312.50, which sale was confirmed by the Referee in Bankruptcy,

and the purchase price paid to the Trustee. This makes a total of \$21,240.35 received by the Trustee from the sale of the real and personal property at the oil refinery plant and the personal property at the office of the bankrupt in Los Angeles.

3.

On April 3, 1943, the State of California, by and through the California State Franchise Tax Commissioner, filed herein a claim for franchise taxes in the sum of \$3,701.35, plus interest. This claim is based upon the following items:

(1) Taxes accruing as of January 1, 1939, for the calendar year 1939, in the sum of \$1,406.12; and

(2) Taxes accruing as of January 1, 1940, for the calendar year 1940, in the sum of \$1,446.24.

The exact amount of these taxes were fixed and determined at a higher figure by the State of California prior to the commencement of this proceeding, and on or about January 3rd, 1941. Thereafter the taxpayer protested the amount. On August 13, 1942, and after the commencement of this proceeding, the taxpayer was notified by the State of California that its protest was allowed in part and the tax originally fixed on or about January 3, 1941, was finally reduced to and fixed in said sum of \$1,406.12, for [27] the calendar year 1939, and for the calendar year 1940 the sum of \$1,446.24. The said taxes bear interest at the rate of 6% per annum from the date of their accrual until paid. The amount due thereon, principal and interest, as of January 15, 1944, is the sum of \$3,634.22, plus interest thereon thereafter at the rate of 6% per annum until paid. The California law

provides that such taxes (which are imposed by the Bank and the Corporation Franchise Tax Act of the State of California) shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien, and shall attach on the first day of the taxable year, and that such lien shall remain until the taxes are paid, or the property subject to the lien is sold for the payment thereof, or until the lien is released, or otherwise extinguished.

4.

On May 10th, 1943, after proceedings had and taken for that purpose, and after due notice to all parties in interest, the said Referee made an Order allowing to Universal Consolidated Oil Company, a corporation, a secured claim upon said real property, by reason of a real property mortgage thereon, in the principal sum of \$8,-444.08, with interest thereon thereafter at the rate of 5% per annum from March 15, 1943, until paid. The said mortgage was executed and delivered on January 10, 1941, by the bankrupt corporation to the said Universal Consolidated Oil Company and thereafter recorded on May 3, 1943, in Book 1089, at Page 508, in the Official Records of Orange County, California. The said mortgage secures the payment of a promissory note executed and delivered by the bankrupt to the said Universal Consolidated Oil Company on January 10, 1941.

The said note provides:

“Should it become necessary to bring action for the collection of this note, the maker hereby agrees to [28] pay a reasonable attorney’s fee to be fixed by the Court.”

The said mortgage provides that it secures the payment to the mortgagee of:

“attorney’s fees in a reasonable sum to be fixed by the court in any action brought to foreclose this mortgage, or in any action or proceeding affecting, or purporting to affect, the security of this mortgage or the rights of the mortgagee hereunder, in which mortgagee may appear, whether brought by mortgagor or mortgagee, or whether such foreclosure action, or other action, or proceeding progress to judgment.”

The balance due, as of January 15, 1944, upon the said note and mortgage, principal and interest, exclusive of attorney’s fees, is the sum of \$10,484.78, plus interest thereon thereafter at the rate of 5% per annum until paid. The said mortgage was contested before the Referee on the said hearings by the United States of America, which contended that such machinery, fixtures and equipment were personal property instead of real property, and were not covered by said mortgage which was a real property mortgage and insufficient to be treated as a personal property mortgage. The mortgagee employed the law firm of Faries & McDowell of Los Angeles to represent it in connection with the foreclosure of the mortgage in this proceeding, and to defend its validity as a real property mortgage, the lien of which was entitled to be satisfied out of the proceeds of such sale of the oil refinery, subject only to any prior valid liens thereon established by the Court, and the expenses of administration fixed and allowed by the Court. The said counsel rendered valuable services in connection with such matters. These services are of the reasonable value of \$750.00. Due notice of the

time [29] and place of the hearing of the application of the said Faries & McDowell for the allowance of \$750.00 for their services in this connection, was given to the creditors of the bankrupt estate by mail, pursuant to the provisions of Section 58 of the Bankruptcy Act. Upon the hearing of said application, no objection was made thereto, and the amount claimed was allowed and added on to the principal due under said mortgage.

5.

Universal Consolidated Oil Company was a California corporation engaged in the business of producing and selling, but not refining, oil. The bankrupt, El Camino Refining Company, had a refinery and needed oil for the operation of its plant, it not having any oil production of its own. Universal Consolidated Oil Company sold its oil to El Camino Refining Company. The balance became high in favor of the Universal Consolidated Oil Company. To secure the payment of this balance, El Camino Refining Company first gave a mortgage to the Oil Company to secure the payment of the note of the El Camino Refining Company to it in the sum of approximately \$70,000.00, and thereafter gave another note secured by a mortgage. The first mortgage, which was dated in December of 1940, has been paid. The second mortgage, which was executed as of January, 1941, and recorded on May 3, 1941, was paid down so that the secured claim herein of Universal Consolidated Oil Company, which has been allowed, now stands at the principal sum of \$8,444.08, plus interest and attorney's fees. The interest and attorney's fees allowed by the Court, when added to the principal of the obligation, makes a total amount of \$11,234.76, plus interest thereon at the rate of 5% per annum from January 15, 1944, until paid.

6.

At the time these various mortgages were entered into between the Universal Consolidated Oil Company and the El Camino [30] Refining Company, it was the intention of the parties that these mortgages should cover all of the refinery property and its adjuncts except the oil in storage and such loose personal property as tools and laboratory equipment. The machinery, fixtures and equipment of the plant, including oil storage tanks, and a cooling tower upon adjoining premises owned by the Pathfinder Oil Co., were a part of such adjuncts. The oil storage tanks were erected in the following manner: A circular excavation of several inches was made. Placed therein for the foundation of the tank was a circular iron band. In addition to being imbedded in the ground, steel spikes from the band were likewise imbedded in the ground. Inside of this circular steel band was placed loose gravel of the thickness of several inches, and upon this foundation was erected each of these oil storage tanks. Said tanks were of the bolted demountable type. They were connected to pipe nipples, valves, bolted valve flanges and other fittings above ground to pipes imbedded in the ground and thus fastened into the refinery system. They were, also, attached to each other by a system of wooden walks and steel ladders as shown on the photographic exhibits. When the construction was completed the refinery and other machinery and equipment, as well as the storage tanks, constituted one completely closed circuit, all of which was used in the refining process.

At the time the various mortgages were made there was a cooling tower used as a part of and in conjunction with the refinery, located upon the mortgaged premises. How-

ever, this cooling tower became dilapidated and, with the consent of the Universal Consolidated Oil Company, and the land owner adjacent, to-wit: the Pathfinder Oil Company, whose officers were identical with those of the bankrupt herein, a new cooling tower was erected by the bankrupt subsequent to the recordation of the said mortgage, upon the property of the Pathfinder Oil Company, [31] and was connected by pipes, valves, etc., into, with and became a part of the refinery operated by the bankrupt. The president of the bankrupt testified that the new cooling tower was erected by it with the intention of making it an integral part of the oil refinery plant the same as the oil storage tanks. The evidence further shows that the refinery itself could not be operated without such a cooling tower, nor without the oil storage tanks. In exchange for the right of the bankrupt to maintain its new cooling tower upon the property of the Pathfinder Oil Company, that company was authorized to, and did maintain, several oil storage tanks upon the bankrupt's property. This arrangement was also known and consented to by the Universal Consolidated Oil Company. It was stipulated that the Pathfinder tanks were not covered by the said mortgage and were not a part of the bankrupt's refinery; or connected therewith.

7.

After the commencement of this proceeding the bankrupt's schedules in this case were signed and verified by the president of the bankrupt corporation. They list all of the machinery, fixtures and equipment located on the oil refinery, including the oil storage tanks and the cooling tower, as personal property. The bankrupt insured the oil refinery plant, including all equipment and machinery thereon, and the oil storage tanks, and the new cooling

tower, against fire, loss, if any, payable to the Universal Consolidated Oil Company and the bankrupt, as their respective interests may appear. The said president testified that said oil storage tanks and cooling tower were erected by the bankrupt corporation with the intention that they should become an integral part of the oil refinery and permanent fixtures attached to the realty.

8.

During the course of the bankruptcy administration the [32] Referee appointed an appraiser to appraise the refinery property of the bankrupt, and during the course of the hearing on the objections to the lien claims of the Franchise Tax Commissioner of the State of California and the Universal Consolidated Oil Company, it was stipulated by all parties in interest that the value received by the Trustee for the new cooling tower, out of the fund, \$19,927.85, realized from the sale, should be a pro-rata share of the appraised value of the cooling tower as shown by the said appraisal, and that this value amounted to \$1,900.00. It was similarly stipulated that the value of the oil storage tanks and the equipment used in connection therewith, was likewise \$8,150.00. It was further stipulated that the Trustee had sold admitted loose personal property located upon the refinery site of the value of \$273.00. This property consisted of laboratory equipment, chairs, desks, etc. This makes a total of \$10,323.00 of said plant sale fund which represents personalty and not real property if the contentions of the United States of America are sound, and a balance of \$9,604.85 of said

fund conceded to be the proceeds of the sale of real property.

9.

The bankrupt has, at all times since the close of the following months, been indebted to the United States of America for gasoline taxes in the amounts set forth below, together with interest thereon as provided by law. The assessment list of the Commissioner of Internal Revenue, carrying said taxes, were received by the Collector of Internal Revenue, at Los Angeles, California, on the dates given:

<u>Month</u>	<u>Amount of Tax</u>	<u>Assessments List Received</u>
October 1941	\$ 301.16	January 6, 1942
November 1941	6,301.31	January 23, 1942
December 1941	3,751.83	March 24, 1942
January 1942	6,090.77	April 28, 1942 [33]
February 1942	6,335.70	May 8, 1942
March 1942	6,044.13	May 28, 1942
April 1942	4,393.00	June 18, 1942
May 1-8, 1942	1,578.42	June 18, 1942

A claim for said federal gasoline taxes was filed in this proceeding on the 20th day of June, 1942.

The bankrupt has at all times since the year 1938 been indebted to the United States of America for deficiencies in its income and excess profits taxes for said year in the sum of \$7,104.66, together with interest thereon as provided by law. The bankrupt has at all times since the close of the taxable year 1939 been indebted to the United

States of America for deficiencies in its income and excess profits taxes for said year in the sum of \$7,276.33, together with interest thereon as provided by law. The Commissioner of Internal Revenue's list, carrying an assessment of said deficiency income and excess profits taxes for the years 1938 and 1939 was received in the office of the Collector of Internal Revenue, at Los Angeles, California, on July 31, 1942, after the commencement of this proceeding. A claim for these taxes was filed in this proceeding on June 20, 1942.

The bankrupt has been indebted to the United States of America, at all times since September 30, 1940, for additional gasoline taxes in the sum of \$40.20, with interest thereon as provided by law. The Commissioner of Internal Revenue's assessment list, carrying an assessment of said additional taxes was received in the office of the Collector of Internal Revenue, at Los Angeles, California, on the 22nd day of January, 1943, after the commencement of this proceeding. A claim for said taxes was filed in this proceeding on the 2nd day of April, 1943.

The bankrupt has been indebted to the United States of America at all times since May 1, 1942, in the sum of \$8.00, with [34] interest thereon as provided by law, as a deficiency in gasoline taxes for the period commencing with June, 1940, and ending in May, 1942. The Commissioner of Internal Revenue's list, carrying an assessment of said taxes, was received in the office of the Collector of Internal Revenue, at Los Angeles, California, on June 29, 1942. A claim was filed in these proceedings

for said taxes on the 13th day of August, 1942, after the commencement of this proceeding.

10.

No lien claims of the United States of America for any of these taxes were recorded in the office of the County Recorder of Orange County, State of California, or filed for record in the office of the Clerk of the United States District Court for the Southern District of California, within whose jurisdictions the oil refinery plant was located.

IV

Papers Transmitted Herewith

Accompanying this Certificate are the following:

(1) The claims filed by the State of California and the United States of America, and the Petition filed by the Universal Consolidated Oil Company for leave to foreclose its mortgage, which Petition contains a copy of the mortgage and the note of the bankrupt corporation secured thereby.

(2) Petition of the Trustee for determination of tax and labor claims and demands.

(3) Order to Show Cause issued thereon by the Referee.

(4) Return of the State of California in response to Order to Show Cause.

(5) Statement of the Nature of Tax Claims of the Collector of Internal Revenue.

(6) Findings of Fact, Conclusions of Law and Order of the Referee. [35]

(7) Petition of the United States of America for a review of the said Order by a Judge of this Court.

(8) The Exhibits received in evidence upon the hearings before the Referee. Included among the Exhibits are photographs showing the physical aspects of the oil refinery plant before its sale by the Trustee.

(9) The Briefs filed by the parties in interest in connection with the hearings before the Referee and the making of the said Order.

Dated: This 9th day of June, 1944.

Ben E. Tarver
Referee

The foregoing is hereby approved as to form:

Reuben G. Hunt
REUBEN G. HUNT,
of Grainger and Hunt,
attorneys for Trustee

Charles H. Carr—E. H.
United States Attorney

By Eugene Harpole
EUGENE HARPOLE,

Attorney for United States of America

McIntyre Faries,
McINTYRE FARIES,
of Faries and McDowell,

attorneys for Universal Consolidated Oil Company

R. S. McLaughlin
R. S. McLAUGHLIN,

Deputy Attorney-General,
acting for Robert W. Kenny, Attorney-General of
California.

[Endorsed]: Filed Jun. 10, 1944. [36]

[Title of District Court and Cause.]

PETITION OF TRUSTEE FOR DETERMINATION
OF TAX AND LABOR CLAIMS AND DEMANDS.

The petition of Paul W. Sampsell respectfully shows:

I

On the 12th day of May, 1942, the above named corporation filed herein its petition for reorganization under Chapter X of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938. The court thereupon, and on the 12th day of May, 1942, made an order herein to the effect that said petition was properly filed and was filed in good faith, and continuing the debtor corporation in possession of its assets. Thereafter, and on the 8th day of March, 1943, an order was made herein adjudicating the said corporation a bankrupt, and referring further proceedings in the administration of its estate to Ben E. Tarver, a referee in bankruptcy of this court. Thereafter, and on the 27th day of March, 1943, Paul W. Sampsell, with the approval of the said referee, was appointed trustee in bankruptcy of the estate of the bankrupt corporation, and there- [37] after on the 31st day of March, 1943, duly qualified. Ever since said 31st day of March, 1943, the said Paul W. Sampsell has been, and now is, the duly appointed, qualified and acting trustee in bankruptcy of said estate.

II

The following labor and tax claims and demands have been filed herein. These must be allocated by the court and their status and amount fixed by the court, either as priority claims against the estate provable under the pro-

visions of Section 64 of the Bankruptcy Act, or payable as charges and expenses of administration pursuant to Section 62 of the Bankruptcy Act.

(a)

Labor Claims and Demands

- (1) Howes and Whitaker, 3313 Union Pacific Avenue, Los Angeles, California Filed June 16, 1943 \$ 113.19

This appears to be a charge and expense of administration created between December 11 and 17, 1942. The demand filed does not disclose who, and upon what authority, caused the services to be rendered, nor is it sufficiently itemized.

- (2) Robert Raff, 218 North Manhattan Place, Los Angeles, California Filed April 28, 1943 556.25

This appears to be a charge and expense of administration for salary from December 31, 1942 to March 8, 1943. The demand filed does not indicate who, and upon what authority, caused the services to be rendered, nor is it sufficiently itemized.

- (3) Carroll Hampton, 2430 Budlong Avenue, Los Angeles, California Filed April 28, 1943 295.00

This appears to be a charge and expense of administration for salary from December 31, 1942 to March 8, 1943. The demand filed does not indicate who, and

upon what authority, caused the services to be rendered, nor is it sufficiently itemized. [38]

- (4) J. Vernon Pohl, 1514 Morningside Dr.,
Burbank, California Filed April 28,
1943 \$ 784.95

This appears to be a demand for a charge and expense of administration. \$327.45, for Mr. Pohl's expenses, and \$457.50 for his salary. No statement is given as to who, and upon what authority, caused the incurring of this expense. The expenses, as part of this demand, are not completely itemized so as to apprise the Trustee of the nature of the charge.

Total Claims and Demands for Labor \$ 1,749.39

(b)

Tax Claims and Demands

- (1) State of California, State Franchise
Tax Commissioner, Sacramento, California, filed April 3, 1943 \$ 3,701.35

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (2) United States of America, Collector of Internal Revenue, Los Angeles, Los Angeles, California, filed April 8, 1943 45.57

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate. [39]

- (3) Los Angeles County, California, John R. Quinn, County Assessor, filed April 1, 1943 \$ 24.59

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (4) Orange County, California, James Sleeper, County Assessor, Santa Ana, filed June 9, 1943 723.81

It is uncertain whether this claim or demand is a claim against the estate

under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (5) Orange County, California, James Sleeper, County Assessor, Santa Ana, California, filed June 9, 1943

534.60

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (6) United States of America, Collector of Internal Revenue at Los Angeles, Los Angeles, California, filed July 16, 1943

107.20

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of [40] items is presented to show the nature of the consideration

for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (7) United States of America, Collector of Internal Revenue at Los Angeles, Los Angeles, California, filed July 23, 1942 \$54,399.85

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (8) United States of America, Collector of Internal Revenue, Los Angeles, Los Angeles, California, filed August 13, 1942

8.48

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (9) State of California, State Board of Equalization, Sacramento, California, filed August 14, 1942, 154.07

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate. [41]

- (10) Orange County, California, James Sleeper, County Assessor, Santa Ana, California, filed August 22, 1942 \$ 670.20

It is uncertain whether this claim or demand is a claim against the estate under Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

- (11) State of California, State Franchise Tax Commissioner, Sacramento, California, filed October 21, 1942 3,369.97

It is uncertain whether this claim or demand is a claim against the estate un-

der Section 64 of the Bankruptcy Act, or a charge and expense of administration under Section 62 of the Bankruptcy Act. No bill of items is presented to show the nature of the consideration for the alleged debt. It does not appear from the claim or demand whether or not any lien is asserted upon any property of the estate.

Total Tax Claims	\$63,739.69
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Recapitulation

Total labor claims or demands	\$ 1,749.39
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Total tax claims or demands	63,739.69
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Total	<hr style="width: 150px; margin: 0 auto;"/> \$65,489.08
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III

The assets of the bankrupt estate consisted of real and personal property. The real property consisted of the premises near Artesia, Orange County, California, upon which was located an oil refinery. The personal property consisted of office furniture and fixtures in Los Angeles, and the machinery and equipment of the oil refinery. All of this property has been sold, under the direction and control of the court, and the sales are now in the process of [42] completion.

IV

On May 10, 1943, the above entitled court in the above entitled proceeding by and through Ben E. Tarver, Referee in Bankruptcy thereof, made an order allowing

to Universal Consolidated Oil Company, a corporation, a secured claim upon said real property by reason of a mortgage thereon, in the sum of \$8,444.08, with interest thereon at the rate of 5% per annum from March 15, 1943. It is necessary, in the administration of this estate, that before such mortgage claim is paid, there be determined by the court the status of such mortgage claim with respect to such tax and labor claims or demands.

Wherefore, the said trustee prays that an order issue herein:

1. Directing all of said parties to appear before the said referee in bankruptcy at a time and place fixed for a hearing and determination of the relative status of these mortgage, tax and labor claims and demands.

2. Directing each of said parties forthwith to prepare for use at said hearing, a complete itemized statement of the nature of the consideration, furnishing the basis of such claims and demands, except the mortgage creditor, such itemized statement to be served upon the trustee at least five days prior to the date of such hearing.

3. For general relief.

4. For the costs of this particular proceeding.

Dated: August 10, 1943.

PAUL W. SAMPSELL

Trustee

GRAINGER and HUNT

By REUBEN G. HUNT

Attorneys for the Trustee [43]

State of California, County of Los Angeles—ss.

Paul W. Sampsell, being first duly sworn, deposes and says:

I am the Trustee named in the foregoing petition; I have read the same and know the contents thereof and the same is true to the best of my knowledge, information and belief.

PAUL W. SAMPSELL

Subscribed and sworn to before me this 10th day of August, 1943.

Bess A. Aldrich (Seal)

Notary Public in and for said County and State.

[Endorsed]: Filed August 11, 1943 at min. past o'clock M. Ben E. Tarver, Referee. By Lydia T. Christopher, Clerk.

[Endorsed]: Filed Jun. 10, 1944. [44]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE.

Upon consideration of the petition filed herein by Paul W. Sampsell, the trustee of the estate of the above named bankrupt corporation, for the determination of the status and relativity of certain mortgage, tax and labor claims and demands.

It Is Hereby Ordered that a hearing for that purpose shall be held before the undersigned referee in bankruptcy

at his office in the Otis Building, Santa Ana, California, on Tuesday, August 31, 1943, at 10:30 o'clock A. M., at which time all of the persons mentioned in said petition shall appear and present proof so that the court may determine the amount and relativity of all of such claims and demands.

It Is Hereby Further Ordered that, with the exception of the mortgage claimant, all of such persons shall forthwith prepare and file with the referee, in advance of the hearing, a copy of an itemized statement of the nature of the consideration supporting such claims and demands, which statement shall be served upon the said trustee at least five days prior to the date of such hearing.

It Is Hereby Further Ordered that service of said petition and this Order to Show Cause shall be sufficient if a copy thereof is mailed to each of the said persons from Los Angeles, California, on or before August 30, 1943.

Dated: August 18, 1943.

BEN E. TARVER
Referee in Bankruptcy

[Endorsed]: Filed Aug. 18, 1943 at min. past o'clock M. Ben E. Tarver, Referee. By Lydia T. Christopher, Clerk.

[Endorsed]: Filed Jun. 10, 1944. [45]

[Title of District Court and Cause.]

—AMENDED CLAIM—

Proof of Priority Claim for Taxes

This claim is secured by statutory lien as provided in Section 29 of the Bank and Corporation Franchise Tax Act.

On the 1st day of April 1943, came William M. Walsh and made oath and said:

1. That he is one of the authorized and acting agents of the Franchise Tax Commissioner of the State of California, and as such he is qualified and empowered to make this claim on behalf of the said Commissioner;

2. That he is informed and believes the said El Camino Refining Company, Bankrupt, was, at or before the filing of the bankruptcy petition, and is now justly and truly indebted to the State of California in the sum of Three Thousand Seven Hundred One and 35/100 Dollars \$3,701.35);

3. That the consideration of the debt is a tax duly levied and assessed under the provisions of the "Bank and Corporation Franchise Tax Act," computed as follows:

Tax (Principal) accrued.....		
First installment delinquent.....	\$.....	
Credit by remittance.....	\$.....	\$.....
Interest on delinquent installment:		
\$..... from.....to.....@.....% per annum	\$.....	
\$..... from.....to.....@.....% per annum	\$.....	
Second installment delinquent.....	\$.....	
Credit by remittance.....	\$.....	\$.....
Interest on delinquent installment:		
\$..... from.....to.....@.....% per annum	\$.....	
\$..... from.....to.....@.....% per annum	\$.....	

Deficiency or Proposed Deficiency Assessment:

No.....Date..... \$.....

Interest on such assessment:

\$..... from.....to.....@.....% per annum \$.....

\$..... from.....to.....@.....% per annum \$.....

Total Tax Principal and Accrued Interest to Date

HereinSCHEDULE ATTACHED \$ 3,701.35

To Which Amount the Trustee and/or Referee Must
Compute and add Thereto All Additional Interest
at the Rate of 6% Per Annum as Follows:

\$..... from.....to date of payment \$.....

\$..... from.....to date of payment \$.....

\$..... from.....to date of payment \$.....

4. That this claim is entitled to the Priority provided
by Sec. 64-a of the Bankruptcy Act;

5. That the due date for the said tax is past; that no
part of the said tax has been paid except as above stated;
that there are no set-offs or counterclaims to the same;
that no note or judgment has been recovered therefor;
that deponent has not, nor has any person, to his knowl-
edge or belief, for the use or benefit of the State of Cali-
fornia, had or received any manner of security for the
said tax or interest or penalty whatever, Except as fol-
lows:

12

William M Walsh

Assistant Commissioner

MR

Subscribed and sworn to before me this 1st day of April 1943.

[Seal]

Thelma N. Brietzke

Notary Public in and for County of Sacramento,
State of California

My commission expires October 4, 1944.

Filed 4-3-43.

Rcd 4/3-43 B E T. [46]

Tax (Principal) accrued.....			
First installment delinquent.....	\$.....		
Credit by remittance.....	\$.....	\$.....	
Interest on delinquent installment:			
\$..... from.....to.....@...% per annum		\$.....	
\$..... from.....to.....@...% per annum		\$.....	
Second installment delinquent.....	\$.....		
Credit by remittance.....	\$.....	\$.....	
Interest on delinquent installment:			
\$..... from.....to.....@...% per annum		\$.....	
\$..... from.....to.....@...% per annum		\$.....	
Tax (Principal) accrued 1/1/43			
First installment delinquent 3/15/43.....	\$	12.50	
Credit by remittance ———	\$	——	\$ 12.50
Interest on delinquent installment:			
\$ 12.50 from 3/15/43 to 4/1/43 @ 6% per annum . . . .		\$	.03
\$..... from.....to.....@...% per annum		\$.....	
Second installment delinquent 9/15/43.....	\$	12.50	
Credit by remittance ———	\$	——	\$ 12.50
Interest on delinquent installment:			
\$..... from.....to.....@...% per annum		\$.....	
\$..... from.....to.....@...% per annum		\$.....	
Tax (Principal) accrued 1/1/39			
First installment delinquent 3/15/39.....	\$	419.48	
Credit by remittance 3/14/39.....	\$	419.48	\$ ——
Interest on delinquent installment:			
\$..... from.....to.....@...% per annum		\$.....	
\$..... from.....to.....@...% per annum		\$.....	

Second installment delinquent 9/15/39.....	\$	419.48	
Credit by remittance 3/14/39.....	\$	419.48	\$ —
Interest on delinquent installment:			
\$..... from..... to..... @.....% per annum		\$.....	
\$..... from..... to..... @.....% per annum		\$.....	

Deficiency or Proposed Deficiency Assessment:

No. 319294 Date 9/25/42.....	. . . .	\$	1,406.12
Interest on such assessment:			
\$1,406.12 from 3/15/39 to 9/25/42 @ 6% per annum		\$	297.94
\$1,704.06 from 9/25/41 to 4/1/43 @ 6% per annum		\$	154.91

Tax (Principal) accrued 1/1/40

First installment delinquent 3/15/40.....	\$	854.34	
Credit by remittance 3/13/40.....	\$	854.34	\$ —
Interest on delinquent installment:			
\$..... from..... to..... @.....% per annum		\$.....	
\$..... from..... to..... @.....% per annum		\$.....	

Second installment delinquent 9/15/40.....	\$	854.34	
Credit by remittance 12/28/40.....	\$	854.34	\$ —
Interest on delinquent installment:			
\$..... from..... to..... @.....% per annum		\$.....	
\$..... from..... to..... @.....% per annum		\$.....	

Deficiency or Proposed Deficiency Assessment:

No. 319295 Date 9/25/42.....	. . . .	\$	1,446.24
Interest on such assessment:			
\$1,446.24 from 3/15/40 to 9/25/42 @ 6% per annum		\$	219.67
\$1,665.91 from 9/25/42 to 4/1/43 @ 6% per annum		\$	151.44

Total Tax Principal and Accrued Interest to Date

Herein	\$	3,701.35
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To Which Amount the Trustee and/or Referee Must
Compute and add Thereto All Additional Interest
at the Rate of 6% Per Annum as Follows:

\$3,382.47 from 4/1/43.....to date of payment	\$.....
\$ 12.50 from 9/15/43.....to date of payment	\$.....
\$..... from.....to date of payment	\$.....

[Endorsed]: Filed 4-3-1943. Ben E. Tarver, Referee.
By B. B., Clerk.

[Endorsed]: Filed Jun. 10, 1944. [47]

[Title of District Court and Cause.]

State of California, County of Los Angeles—ss.

CLAIM OF UNITED STATES FOR TAXES.

Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says: (1) That the above-named, is justly and truly indebted to the United States in the sum of \$54,399.85, With Interest and/or Penalties thereon as hereinafter stated; and (2) That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Nature of Tax	Period	Tax	Penalty	Interest	
				Assessed	Accrued
Gasoline	Oct. 1941 Bal.	\$ 301.16		As provided by law	
"	Nov. 1941	6,301.81		\$ 15.54	" " "
"	Dec., 1941	8,751.83		61.02	" " "
"	Jan., 1942	6,090.77		48.47	" " "
"	Feb., 1942	6,355.70		47.45	" " "
"	Mar., 1942	6,044.13		14.90	" " "
"	Apr., 1942	4,393.00		10.83	" " "
"	May 1-8, '42	1,578.52		3.93	" " "
INCOME—Def.	1938	6,742.02			" " "
Excess Profits	1938	362.44			" " "
INCOME—Def.	1939	5,803.12			" " "
Excess Profits	1939	1,473.21			" " "
		\$54,197.71		\$202.14	
		\$54,399.85			

The Collector of Internal Revenue should be notified before payment of this claim is made in order that advice may be given with respect to the correct amount of statutory interest due.

*With respect to (5) below, the United States hold a security bond in the amount of \$4,000.00.

Taxable Wages	\$.....	Taxable Wages	\$.....	Taxable Wage	\$.....
Tax (%)	.....	Tax (%)	.....	Tax (%)	.....
Credit Taken	.....	Credit Taken	.....	Credit Taken	.....
Due on Return	.....	Due on Return	.....	Due on Return	.....
Paid on Return	.....	Paid on Return	.....	Paid on Return	.....
Credit Disallowed	.....	Credit Disallowed	.....	Credit Disallowed	.....
Balance Due (Tax)	.....	Balance Due (Tax)	.....	Balance Due (Tax)	.....

(3) That no part of said debt has been paid, but that the same is now due and payable at the office of the Collector of Internal Revenue at Los Angeles, Calif.; (4) That there are no set-offs or counterclaims to said debt; (5)* That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens; (6) That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon; (7) That said debt has priority, and must be paid in full in advance of distributions to creditors, as and to the extent provided in Section 64 in Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 20th day of June, 1942.

Nat Rogan

Collector of Internal Revenue for the Sixth District of California.

Subscribed and sworn to before me this 20th day of June 1942.

T. G. Albright [Seal]

Notary Public

My commission expires Oct. 18, 1944.

[Endorsed]: Filed Jul. 3, 1942. [48]

[Title of District Court and Cause.]

STATEMENT OF THE NATURE OF TAX CLAIMS
OF THE COLLECTOR OF INTERNAL REVENUE.

In response to the Order to Show Cause, issued herein on the 11th day of August, 1943, Harry C. Westover, Collector of Internal Revenue for the Sixth District of California, respectfully shows to the court as follows:

I

The claim filed in the sum of \$180.22 on or about the 30th day of June, 1943, discloses upon its face that the bankrupt is indebted to the United States for Victory taxes during the first quarter of the calendar year of 1943 in the sum of \$74.50, and Federal Insurance contributions for the first quarter of 1943 in the sum of \$34.60, plus statutory interest. The assessment lists carrying these taxes were received in the Collector's office on the 18th day of May, 1943 and June 21, 1943 respectively. The Victory Tax represents a withholding tax of 5% upon wages paid during the period covered. The Federal Insurance and contributions tax represents withholding tax of 2% upon wages earned or paid during the first quarter of 1943.

II

The claim of the Collector of Internal Revenue filed on or [49] about the 2nd day of April, 1943 for additional September, 1940 gasoline taxes in the sum of \$45.57, with accruing interest as provided by law represents Federal tax upon gasoline produced and sold by the bank-

rupt during the month of September, 1940, computed at the rate of $1\frac{1}{2}$ cents per gallon. The assessment list carrying the above entitled tax was received in the office of the Collector of Internal Revenue for the Sixth Collection District of California on the 22nd day of January, 1943.

III

The claim of the Collector of Internal Revenue filed on or about the 13th day of August, 1942 for deficiency gasoline taxes covering the period of June, 1940 to May, 1942 in the sum of \$8.48 represents Federal gasoline taxes and interest accruing thereon, determined on account of the production and sale of gasoline by the bankrupt during the months, June, 1940 to May, 1942. The taxes imposed at the rate of $1\frac{1}{2}$ cents per gallon, upon 533 gallons of gasoline added to kerosene distillate in the month of May, 1941. The assessment list bearing these taxes was received in the office of the Collector of Internal Revenue on June 29, 1942.

IV

The claim of the Collector of Internal Revenue for the Sixth Collection District of California for the sum of \$54,399.85 with accruing interest, represents Federal gasoline taxes for the months of October, November and December, 1941, January, February, March, April, and May 1 to 8, 1942. This tax is imposed upon gasoline produced by the bankrupt at the rate of $1\frac{1}{2}$ cents per gallon. The claim further contains items of deficiency income and excess profits taxes for the years 1938 and 1939 as determined by the United States Board of Tax Appeals in its case, docket No. 106,202 on June 24, 1942. The assess- [50] ment list carrying these income and ex-

cess profits taxes was received in the office of the Collector on July 31, 1942. The assessment lists covering said gasoline taxes were received as follows:

<u>Year</u>	<u>Amount</u>	<u>Assessed Interest</u>	<u>Date Assessment Received</u>
Oct., 1941	Bal. \$ 301.16		Jan. 6, 1942
Nov., 1941	6,301.81	\$15.54	Jan. 23, 1942
Dec., 1941	3,751.83	61.02	Mar. 24, 1942
Jan., 1942	6,090.77	48.47	Apr. 28, 1942
Feb., 1942	6,336.70	47.45	May 8, 1942
Mar., 1942	6,044.13	14.90	May 26, 1942
Apr., 1942	4,393.00	10.83	June 18, 1942
May. 1-8, 1942	1,578.42	.....	June 18, 1942

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell—E. H.

E. H. MITCHELL,

Assistant United States Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

Received copy of the within this 27 day of August, 1943.

PAUL W. SAMPSELL,

Trustee of El Camino Refining Co., Bankrupt,

by E. S. Craig.

[Endorsed]: Filed Aug. 28, 1943. Ben E. Tarver, Referee, By Lydia T. Christopher, Clerk.

[Endorsed]: Filed Jun. 10, 1944. [51]

[Title of District Court and Cause.]

RETURN OF THE STATE OF CALIFORNIA IN
RESPONSE TO ORDER TO SHOW CAUSE
ISSUED AUGUST 11, 1943.

Comes Now the People of the State of California and respectfully shows that the above entitled bankrupt is lawfully indebted to the State of California for the following taxes:

I

As a cost of administration for the privileges extended by the Bank and Corporation Franchise Tax Act of the State of California in the principal sum of.....	\$ 25.00
Plus interest at the rate of 6% per annum, as provided in Section 24(c) of said act which requires such interest to be collected as part of such tax, from March 15, 1943 to September 1, 1943, in the amount of .....	.38
	<hr/>
	\$ 25.38 [52]

II

As a prior tax lien claim for the privileges extended by the Bank and Corporation Franchise Tax Act, which accrued and became a lien on January 1, 1939 in the principal amount of.....	\$1,406.12
Plus accrued interest at the rate of 6% per annum as provided in Section 24 of said act, which requires such interest to be collected as part of such tax, from March 15, 1939 to September 1, 1943 in the amount of	495.45
	<hr/>
Total	\$1,901.57

III

As a prior tax lien claim for the privileges extended by the Bank and Corporation Franchise Tax Act of the State of California which accrued and became a lien on January 1, 1940 in the principal amount of	\$1,446.24
Plus accrued interest at the rate of 6% per annum, as provided in Section 24 of said act which requires such interest to be collected as part of such tax, from March 15, 1940 to September 1, 1943 in the sum of	412.76
Total	<hr/> \$1,859.00

IV

The lien securing the two items set out above in paragraphs numbered II and III is set forth in Section 29 of the Bank and Corporation Franchise Tax Act which, so far as here pertinent, reads as follows: [53]

"The taxes imposed by this act shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien and shall attach on the first day of the 'taxable year' . . . The lien provided for in this section shall remain until the taxes are paid or the property subject to the lien is sold for the payment thereof, or until the lien is released or otherwise extinguished. . . ."

The tax items hereinabove referred to in paragraphs I, II and III constitute the same items set forth as item number (1) on page 3 of the Trustee's Petition for determination of tax and labor claims and demands, dated August 10 1943 on file herein. This item constituted an amended claim and superseded the claim set forth as item (11) on page 6 of said Trustee's Petition above referred to.

V

As a prior tax claim under Section 64a of the Bankruptcy Act, for Retail Sales taxes, which accrued between July 1, 1939 and May 12, 1942 in the principal amount of	\$ 141.42
Plus interest at the rate of $\frac{1}{2}$ of 1% per month as provided by Section 22 of the Retail Sales Tax Act to September 15, 1943 in the amount of.....	21.14

Total	\$162.56 [54]
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This is the same item mentioned as number (9) on page 5 of the Trustee's Petition above referred to.

Dated: August 27, 1943.

ROBERT W. KENNY,
Attorney General of the State of California

By R. S. McLAUGHLIN
Deputy Attorney General
Attorneys for State of California. [55]

[Verified.]

[Endorsed]: Filed August 30, 1943. Ben E. Tarver, Referee. By Lydia E. Christopher, Clerk.

[Endorsed]: Filed Jun. 10, 1944. [56]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER.

Paul W. Sampsell, the Trustee in Bankruptcy of the estate of the above-named bankrupt corporation, having filed herein his petition for the determination of the status and relativity of certain mortgage, tax and labor claims and demands, and the undersigned Referee having thereupon issued on August 11, 1943, an Order directing the parties named in the said petition to appear before the Referee at a time and place specified, then and there to show cause, if any, why such determination should not be made,

And the said Petition and the said Order to Show Cause coming on regularly for hearing before the said referee on August 31, 1943, and thereafter, and the following appearances having been made:

1. Paul W. Sampsell, the Trustee in Bankruptcy, in person.
2. Reuben G. Hunt, of the firm of Grainger & Hunt, counsel for the Trustee.
3. Frank C. Weller, of the firm of Craig & Weller, counsel for the debtor-bankrupt.
4. R. S. McLaughlin, Deputy Attorney General, for the State of California.
5. Eugene Harpole, Special Attorney for the United States of America, Internal Revenue Department.
[73]
6. McIntyre Faries, of the firm of Faries & McDowell, counsel for Universal Consolidated Oil Co.

7. J. S. Ogle, County Counsel of Orange County, California.
8. Thomas S. Tobin, counsel for Howes & Whittaker, Robert Raff, Carroll Hampton, and J. Vernon Pohl.

And testimony having been offered and received relative to the matters set forth in the said Petition, and the case having been submitted to the Referee for decision and considered by him, the Referee makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact.

I.

On the 12th day of May, 1942, the above-named bankrupt corporation filed herein its petition for reorganization under Chapter X of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938. The Court thereupon, and on the 12th day of May, 1942, made an order herein to the effect that said petition was properly filed and was filed in good faith, and continuing the debtor corporation in possession of its assets. Thereafter, and on the 8th day of March, 1943, an order was made herein adjudicating the said corporation a bankrupt, and referring further proceedings in the administration of its estate to Ben E. Tarver, a Referee in Bankruptcy of this Court. Thereafter, and on the 27th day of March, 1943, Paul W. Sampsell, with the approval of the said Referee, was appointed Trustee in Bankruptcy of said estate, and thereafter and on the 31st day of March, 1943, duly qualified. Ever since said 31st day of March, 1943, the said Paul W. Sampsell has been, and now is, the duly appointed, qualified and acting Trustee in Bankruptcy of said estate.

II.

The assets of the bankrupt estate consisted of real and [74] personal property. The real property comprised premises at Los Alamitos, Orange County, California, upon which was located and affixed thereto and made a part of the real property an oil refinery plant. The said real property is described as follows:

Lots 13 to 24 inclusive, Block 12 of the Town of Alamitos, Orange County, California, as shown on map filed in Book 1, Page 25, Records of Surveys, in the office of the County Recorder of said County, excepting therefrom that portion of said lands conveyed to the Southern Pacific Railroad Company by deed recorded January 13, 1897, in Book 29, page 329 of Deeds, Records of Orange County, California.

The personal property comprised: (1) loose articles not permanently affixed to the said premises as a part thereof; and (2) furniture and fixtures at the office formerly conducted by the bankrupt corporation in Los Angeles. By the consent of all lien claimants, all of this property, real and personal, has been sold under the direction and control of the Court. The said sale has been consummated and the purchase price paid to the Trustee. By the consent of all lien claimants, and with the approval of the Trustee and the Court, all liens claimed upon the said property have been transferred to the fund realized from the sales, subject to such expenses of administration fixed by the Court, after due notice, which arise out of the costs and expenses of the preservation of the property, its liquidation and reduction to cash, the determination of the status and relativity of liens asserted upon said cash, and the proper distribution of such cash among the persons entitled to share in the same. The amount received from

the sale of the oil refinery plant was \$19,927.85. Except as hereinafter stated all of the machinery, fixtures and equipment located and affixed thereto and made a part of the real property upon the said oil refinery at the time of the said sale, was real property and not personal property. Except as hereinafter stated all of the funds realized from the said sale are proceeds of the sale of such real property. Only a very small [75] amount thereof is the result of the sale of personal property located on the said premises.

In addition to the other property located and affixed thereto and made a part of the real property upon the said premises, there were oil tanks, including ladders, stairways, walkways, guard rails, vents, cover plates, valves and fittings, all of which were, in the contemplation of the parties to the real property mortgage upon the said real property, hereinafter referred to, covered by the said mortgage, and all of which were an integral and essential part of the said oil refinery and used in the operation thereof. The said oil tanks, together with the incidental equipment used in connection therewith and above mentioned, were and are permanently affixed to the other portions of the said oil refinery and to the said real property. The portion of said sale price of \$19,927.85, for the said oil refinery, attributable to the value of the said oil tanks and the said equipment used in connection therewith, is \$8,150.00.

One part of said oil refinery, that is, a new cooling tower is and was not located upon any part of the premises described in the said mortgage, but is and was located upon adjacent real property belonging to The Pathfinder Company. Said new cooling tower was, and is, an integral, necessary and essential part of the said oil refinery, and was, and is, permanently attached thereto by pipes above

and below ground and by wiring and conduit. Said new cooling tower was so located upon said Pathfinder real property under an oral agreement in exchange for a similar right granted The Pathfinder Company by the bankrupt to maintain several oil storage tanks upon the bankrupt's oil refinery property. Said agreement was known and consented to by the Universal Consolidated Oil Co., the mortgagee in the said real property mortgage hereinafter referred to. Said new cooling tower was not in existence at the time of the execution and delivery of the said real property mortgage to the said Universal Consolidated Oil Co., but was after- [76] wards erected upon the Pathfinder Company real property by the bankrupt to replace an old cooling tower, which was, at the time of the execution and delivery of the said real property mortgage, actually standing upon the real property described in the said mortgage. The old cooling tower was demolished when the new cooling tower was erected. The proper portion of the total sales price of \$19,927.85, of the oil refinery plant attributable to the value of the said new cooling tower, is \$1,900.00.

Personal property of the bankrupt, not located upon the refinery premises, was sold by the Trustee in Bankruptcy, at a separate sale for \$1312.50, which sale was confirmed by the Referee in Bankruptcy, and the purchase price paid to the Trustee.

The personal property of the bankrupt located upon the said oil refinery premises was sold by the Trustee, together with the real estate, as one unit, as above stated, for a total purchase price of \$19,927.85. The portion of said sale price of said oil refinery, attributable to the said personal property located upon the refinery premises, is \$273.00. The total sale price of all of the personal property of the bankrupt is \$1,585.50.

III.

On April 3, 1943, the State of California, by and through the California State Franchise Tax Commissioner, filed herein a claim for franchise taxes in the sum of \$3,701.35, plus interest. This claim is based upon the following items: (1) taxes accruing as of January 1, 1939, for the calendar year 1939, in the sum of \$1,406.12; and (2) taxes accruing as of January 1, 1940, for the calendar year 1940, in the sum of \$1,446.24. The exact amount of these taxes was not fixed and determined at the time they accrued but were fixed and determined prior to the commencement of these bankruptcy proceedings. After the commencement of these bankruptcy proceedings, and during their course, after consideration of a protest made by the bankrupt corporation, the amounts of such taxes, so fixed and determined prior to bankruptcy, were voluntarily reduced by the State of California to the said sums of \$1,406.12, as of January 1, 1939, [77] and \$1,446.24, as of January 1, 1940. The said taxes bear interest at the rate of 6% per annum from the date of their accrual until paid. The amount due thereon, principal and interest, as of January 15, 1944, is the sum of \$3,634.22, plus interest thereon thereafter at the rate of 6% per annum until paid. The California law provides that such taxes (which are imposed by the Bank and the Corporation Franchise Tax Act of the State of California) shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien, and shall attach on the first day of the taxable year; and that such lien shall remain until the taxes are paid, or the property subject to the lien is sold for the payment thereof, or until the lien is released, or otherwise extinguished.

In connection with these taxes the State of California, by and through its State Franchise Tax Commissioner, filed herein, on October 21, 1942, a claim for the same taxes in the sum of \$3,369.97, but has notified the court that such claim is to be disregarded since it is covered by the said claim filed April 3, 1943.

IV.

On May 10, 1943, after proceedings had and taken for that purpose, and after due notice to all parties in interest, the said Referee made an Order allowing to Universal Consolidated Oil Co., a corporation, a secured claim upon said real property, by reason of a real property mortgage thereon, in the principal sum of \$8,444.08, with interest thereon thereafter, at the rate of 5% per annum from March 15, 1943, until paid. The said mortgage was executed and delivered on January 10, 1941, by the bankrupt corporation to the said Universal Consolidated Oil Co., and thereafter recorded on May 3, 1943, in Book 1089, at Page 508, in the Official Records of Orange County, California. The said mortgage [78] secures the payment of a promissory note executed and delivered by the bankrupt to the said Universal Consolidated Oil Co. on January 10, 1941.

The said note provides: "Should it become necessary to bring action for the collection of this note, the maker hereby agrees to pay a reasonable attorney's fee to be fixed by the Court." The said mortgage provides that it secures the payment to the mortgagee of "attorney's fees in a reasonable sum to be fixed by the court in any action brought to foreclose this mortgage, or in any action or proceeding affecting or purporting to affect the security of this mortgage or the rights of mortgagee hereunder,

in which mortgagee may appear, whether brought by mortgagor or mortgagee, or whether such foreclosure action, or other action, or proceeding progress to judgment." The balance due, as of January 15, 1944, upon the said note and mortgage, principal and interest, exclusive of attorney's fees, is the sum of \$10,484.78, plus interest thereon thereafter at the rate of 5% per annum until paid. The said mortgage was contested before the Referee on the said hearings, by the United States of America, which contended that the said mortgage insofar as it covered the machinery, fixtures and equipment upon the said oil refinery plant, purported to be a chattel mortgage covering personal property, and that such machinery, fixtures and equipment were personal property instead of real property. The mortgagee employed the law firm of Faries & McDowell of Los Angeles to represent the mortgagee in connection with the foreclosure of the mortgage in the bankruptcy proceedings, and to defend its validity as a real property mortgage, the lien of which was entitled to be satisfied out of the proceeds of such sale of the oil refinery, subject only to any prior valid liens thereon established by the court, and the expenses of administration fixed and allowed by the court. The said counsel rendered valuable services in connection with such matters. These [79] services are of the reasonable value of \$750.00. Due notice of the time and place of the hearing of the application of the said Faries & McDowell for the allowance of \$750.00 for their services in this connection, was given to the creditors of the bankrupt estate by mail, pursuant to the provisions of Section 58 of the Bankruptcy Act. Upon the hearing of said application, no objection was made thereto.

V.

Howes & Whittaker filed herein, on June 16, 1943, a claim for \$113.19 based upon engineering services rendered the debtor corporation during the reorganization part of this proceeding and prior to the adjudication in bankruptcy, at the instance and request of the debtor corporation. The reasonable value of such services is \$113.19. The rendition of such services was impliedly authorized by the Judge of this Court during the reorganization part of this proceeding.

VI.

Robert Raff filed herein, on April 28, 1943, a claim for \$556.25, based upon services rendered as Vice President of the debtor corporation from December 31, 1942 to March 8, 1943, during the reorganization part of this proceeding and prior to the adjudication in bankruptcy, at the instance and request of the debtor corporation. The reasonable value of such services is \$556.25. The rendition of such services was impliedly authorized by the Judge of this Court during the reorganization part of this proceeding. This amount of \$556.25 is subject to the deduction of \$27.38, covering taxes due from Robert Raff to the United States of America, which will have to be paid out of the bankrupt estate, leaving the net amount of this claim to be paid out of the estate the sum of \$528.87.

VII.

Carroll Hampton filed herein, on April 28, 1943, a claim [80] for \$295.00, based upon services rendered as Office Manager of the debtor corporation from December 31, 1942 to March 8, 1943, during the reorganization part of this proceeding and prior to the adjudication in bankruptcy, at the instance and request of the debtor corpora-

tion. The reasonable value of such services is \$295.00. The rendition of such services was impliedly authorized by the Judge of this Court during the reorganization part of this proceeding. This amount of \$295.00 is subject to the deduction of \$7.85, covering taxes due from Carroll Hampton to the United States of America, which will have to be paid out of the bankrupt estate, leaving the net amount of this claim to be paid out of the estate the sum of \$287.15.

VIII.

J. Vernon Pohl filed herein, on April 28, 1943, a claim for \$784.95, based upon services rendered as President of the debtor corporation, in the sum of \$457.50, and expenses incurred as such President, in the sum of \$327.45, during the reorganization part of this proceeding and prior to the adjudication in bankruptcy, at the instance and request of the debtor corporation. The reasonable value of such services is \$457.50; and the amount of such expenses is reasonable. The rendition of such services, and the incurring of such expenses, was impliedly authorized by the Judge of the Court during the reorganization part of this proceeding. This amount of \$784.95 is subject to the deduction of \$24.27, covering taxes due from J. Vernon Pohl to the United States of America, which will have to be paid out of the bankrupt estate, leaving the net amount of this claim to be paid out of the estate the sum of \$760.68.

IX.

The bankrupt has, at all times since the close of the following months, been indebted to the United States of America for gasoline taxes in the amounts set forth below, together with interest [81] thereon as provided by law. The assessment list of the Commissioner of Internal

Revenue, carrying said taxes, were received by the Collector of Internal Revenue, at Los Angeles, California, on the dates given.

<u>Month</u>	<u>Amount of Tax</u>	<u>Assessment List Received</u>
October, 1941	\$ 301.16	January 6, 1942
November, 1941	6,301.31	January 23, 1942
December, 1941	3,751.83	March 24, 1942
January, 1942	6,090.77	April 28, 1942
February, 1942	6,335.70	May 8, 1942
March, 1942	6,044.13	May 28, 1942
April, 1942	4,393.00	June 18, 1942
May 1-8, 1942	1,578.42	June 18, 1942

A claim for said federal gasoline taxes was filed in this proceeding on the 20th day of June, 1942.

X.

The bankrupt has at all times since the year 1938 been indebted to the United States of America for deficiencies in its income and excess profits taxes for said year in the sum of \$7,104.66, together with interest thereon as provided by law. The bankrupt has at all times since the close of the taxable year 1939 been indebted to the United States of America for deficiencies in its income and excess profits taxes for said year in the sum of \$7,276.33, together with interest thereon as provided by law. The Commissioner of Internal Revenue's list, carrying an assessment of said deficiency income and excess profits taxes for the years 1938 and 1939 was received in the office of the Collector of Internal Revenue, at Los Angeles, California, on July 31, 1942. A claim for these taxes was filed in this proceeding on June 20, 1942.

XI.

The bankrupt has been indebted to the United States of America, at all times since September 30, 1940, for additional [82] September, 1940, gasoline taxes, in the sum of \$40.20, with interest thereon as provided by law. The Commissioner of Internal Revenue's assessment list, carrying an assessment of said additional taxes for the month of September, 1940, was received in the office of the Collector of Internal Revenue, at Los Angeles, California, on the 22nd day of January, 1943. A claim for said taxes was filed in this proceeding on the 2nd day of April, 1943.

XII.

The bankrupt has been indebted to the United States of America at all times since May 1, 1942, in the sum of \$8.00, with interest thereon as provided by law, as a deficiency in gasoline taxes for the period commencing with June, 1940, and ending in May, 1942. The Commissioner of Internal Revenue's list, carrying an assessment of said taxes was received in the office of the Collector of Internal Revenue, at Los Angeles, California, on June 29, 1942. A claim was filed in these proceedings for said taxes on the 13th day of August, 1942.

XIII.

The County of Los Angeles, State of California, by and through its County Assessor, filed herein on April 1, 1943, its claim for personal property taxes on the property of the estate located in the City of Los Angeles in the sum of \$24.59. The said claim arose by reason of transactions during the bankruptcy, and is payable pro rata as an expense of administration pursuant to the provisions of Section 62-a of the Bankruptcy Act.

XIV.

The County of Orange, State of California, by and through its County Assessor, filed herein on June 9, 1943, its claim for personal property taxes upon personal property located in Orange County, California, in the sum of \$723.81. This claim is for the fiscal year of 1941-1942, and is payable only as a priority claim under Section 64-a-(4) of the Bankruptcy Act, and is subject [83] to the payment of expenses of administration and the liens fixed and determined herein. It is not necessary to determine at this time the validity and amount of such claim since the funds in the estate will be insufficient to pay the expenses of administration and such liens.

XV.

The County of Orange, State of California, by and through its County Assessor, filed herein on June 9, 1943, its claim in the sum of \$534.60 for personal property taxes on the personal property of the estate in Orange County, California, covering the fiscal year 1942-1943. This claim is an expense of administration herein payable pro rata pursuant to provisions of Section 62-a of the Bankruptcy Act.

XVI.

The United States of America, by and through the Collector of Internal Revenue at Los Angeles, filed herein on July 16, 1943, its claim for Federal Victory Taxes and insurance contributions in the sum of \$107.10. This claim arose out of transactions arising during the course of the bankruptcy proceedings and is payable pro rata as an expense of administration herein pursuant to the provisions of Section 62-a of the Bankruptcy Act. The amount due, as of January 15, 1944, is \$113.79, plus interest thereafter at 6% per annum until paid.

XVII.

The State of California, by and through the State Board of Equalization, filed herein on August 14, 1942, its claim for retail sales taxes in the sum of \$154.07. This claim is for the fiscal year of 1941-42, and is payable only as a priority claim under Section 64-a-(4) of the Bankruptcy Act, and is subject to the payment of expenses of administration and the liens fixed and determined herein. It is not necessary to determine at this time the validity and amount of such claim [84] since the funds in the estate will be insufficient to pay the expenses of administration and such liens.

XVIII.

The County of Orange, State of California, by and through its County Assessor, filed herein on August 22, 1942, its claim for personal property taxes in the sum of \$670.20, covering personal property of the bankrupt located in Orange County, California. This claim is to be disregarded since it is covered by the claim of \$723.81 of Orange County hereinabove referred to.

XIX.

The State of California, by and through its State Franchise Tax Commissioner, filed herein its claim for minimum franchise corporation taxes for the fiscal year 1943-1944 in the sum of \$25.00. This claim arose during the course of the bankruptcy proceedings and is entitled to be paid pro rata as an expense of administration pursuant to the provisions of Section 62-a of the Bankruptcy Act. The balance due thereon, as of January 15, 1944, is \$26.25, plus interest thereon thereafter at the rate of 6% per annum until paid.

XX.

The State of California, by and through its Department of Employment, filed herein its claim for unemployment reserve taxes for the fiscal year 1943-1944 in the sum of \$34.60. This claim arose by reason of transactions during the course of the bankruptcy proceedings and is entitled to be paid pro rata as an expense of administration pursuant to provisions of Section 62-a of the Bankruptcy Act. The balance due, as of January 15, 1944, is the sum of \$40.60, plus interest on the sum of \$34.60 thereafter at the rate of 6% per annum until paid.

XXI.

On December 23, 1943, the said Referee signed, filed and entered an Order herein allowing and ordering paid out of the [85] estate forthwith the total sum of \$6,929.83 as expenses of administration of the type and character hereinbefore referred to. There will not be sufficient funds in the estate wherewith to pay such expenses of administration, and such valid liens of the State of California, and of the Universal Consolidated Oil Co. herein provided for. There will be sufficient money in the estate to pay said expenses of administration so allowed, and the tax liens of the State of California hereinbefore referred to, and a substantial sum in connection with the mortgage lien of the Universal Consolidated Oil Co. hereinbefore referred to. There will be other expenses of administration of the same type and character which will, necessarily, be allowed and paid before the closing of this case. There will not be left any funds on hand wherewith to pay any valid liens of the United States of America for taxes, or any debts entitled to priority of payment pursuant to Section 64-a of the Bankruptcy Act other than expenses of administration, or any claims of general creditors against the bankrupt estate.

Conclusions of Law.

I.

The State of California has a valid first lien upon the funds now in the hands of the Trustee in Bankruptcy in the sum of \$3,634.22, as of January 15, 1944, plus interest thereon thereafter at the rate of 6% per annum until paid.

II.

The Universal Consolidated Oil Co., a corporation, has a valid second lien upon such funds, in the total sum of \$11,234.78, as of January 15, 1944, plus interest thereon thereafter at the rate of 5% per annum until paid. This amount of \$11,234.78 includes the sum of \$750.00 to compensate Faries & McDowell for their legal services in connection with the foreclosure of the mortgage held by the said corporation above referred to, and its defense in these [86] proceedings. Said sum of \$750.00 should be added to and become a part of the mortgage debt and the payment thereof secured by said mortgage the same as the principal and interest of the said note.

III.

Both said first and second valid liens are subject to the payment of expenses of administration herein fixed and allowed by the court upon hearing, after due notice to the parties in interest, which arise out of the costs and expenses of the preservation of the property affected by such liens, its liquidation and reduction to cash, the determination of the status and relativity of the liens asserted upon such cash, and the proper distribution of said cash among the persons entitled to the same.

IV.

No further consideration need be given to the validity or amount of any tax liens asserted upon the funds of the

estate by the United States of America, unless it ultimately appears that there will be sufficient funds in the estate to pay all such expenses of administration and said first and second liens of the State of California and the Universal Consolidated Oil Co. in full and leave a surplus on hand.

Order.

Pursuant to the foregoing Findings of Fact and Conclusions of Law, It Is Hereby Ordered And Decreed that:

(1) The State of California holds a valid first lien upon the funds now in the hands of the Trustee in Bankruptcy in the sum of \$3,634.22, as of January 15, 1944, plus interest thereon thereafter at the rate of 6% per annum until paid.

(2) The Universal Consolidated Oil Co., a corporation, holds a valid second lien upon such funds in the sum of \$11,234.78, as of January 15, 1944, plus interest thereon thereafter at the rate of 6% per annum until paid. [87]

(3) Both the said first and the said second lien are subject to the payment of the expenses of administration fixed by the court herein, after hearing upon due notice to the parties herein, which arise out of the costs and expenses of the property affected by such liens, its liquidation and reduction into cash, the determination of the status and relativity of the liens asserted upon such cash, and the proper distribution of said cash among the persons entitled to the same. If the assets of the estate are insufficient to pay such liens and such expenses, then such expenses shall first be paid, next the said first lien of the State of California, and then the balance remaining to the Universal Consolidated Oil Co. in connection with its said second lien.

(4) No further consideration will be given to the validity or amount of any tax liens asserted upon the funds of the estate by the United States of America, unless it ultimately appears that there will be sufficient funds in the estate to pay all such expenses of administration and said first and second liens of the State of California and the Universal Consolidated Oil Co. in full.

Dated: February 2nd, 1944.

Ben E. Tarver,
Referee in Bankruptcy. [88]

The foregoing Findings of Fact, Conclusions of Law, and Order, are hereby approved as to form, pursuant to General Rule 7 of this Court:

GRAINGER & HUNT,
by Reuben G. Hunt,
Attorneys for Trustee in Bankruptcy,
FARIES & McDOWELL,
by McIntyre Faries,
Attorneys for Universal Consolidated Oil Co.,
Eugene Harpole,
Special Attorney for the United States of America,
Internal Revenue Department,
Joel E. Ogle,
County Counsel, Orange County, California,
ROBERT W. KENNY,
Attorney-General,
by R. S. McLaughlin,
Deputy Attorney-General, Attorney for the
State of California.

[Endorsed]: Filed Mar. 2nd 1944. Ben E. Tarver,
Referee. By B. E. T.

[Endorsed]: Filed Jun 10, 1944. [89]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER.

Comes Now the United States of America, by and through its attorneys, Charles H. Carr, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney for the Bureau of Internal Revenue, and files this, its Petition for Review of that certain Order made and entered in the above entitled proceeding by the Referee in Bankruptcy on the 2nd day of March, 1944, subordinating the payment of all the tax claims of the United States except that claim for \$107.10 relating to the year 1943 to those of the State of California for \$3,634.22, and that of Universal Consolidated Oil Company for \$11,234.78, which Order reads as follows:

(Findings of Fact, Conclusions of Law and Order appearing at this place in the Petition for Review is the same as the Findings of Fact, Conclusions of Law and Order appearing at P. 60 of the Transcript of Record so is not repeated.) [90]

In this, its Petition for a Review of said Order of March 2, 1944, the United States of America alleges that the Referee in Bankruptcy erred in the said Order in the following respects:

1. The Referee in Bankruptcy erred in subordinating the tax liens of the United States which were in existence before the date of bankruptcy and secured payment to it of the then assessed gasoline taxes for the months of October, 1941 to March, 1942, inclusive, in the aggregate amount of \$28,824.90, to the liens of the State of Califor-

nia securing payment to it of 1939 and 1940 franchise taxes, for the reason that said tax liens of the United States were specific whereas liens of the State of California securing the 1939 and 1940 franchise taxes were mere general inchoate liens.

2. The Referee in Bankruptcy erred in holding and finding that the cooling tower located on the Pathfinder property and the oil and gasoline tanks located upon the El Camino property were fixtures of the El Camino property and therefore covered by and subject to the mortgage of the Universal Consolidated Oil Company for the reason that the evidence before the Referee disclosed that said cooling tower and storage tanks were in no way affixed to the land of El Camino Refining Corporation in a manner that would constitute them fixtures under the laws of the State of California.

3. The Referee in Bankruptcy erred in failing and refusing to find and hold that the tax liens of the United States securing payment of its gasoline taxes assessed against El Camino Refining Corporation for the months of October, 1941 to March, 1942, inclusive, were superior to the liens of the State of California securing payment of its 1939 and 1940 franchise taxes and to the lien of the Universal Consolidated Oil Company with respect to the proceeds realized from the sale of said cooling tower located upon the Pathfinder property and the gasoline and oil storage tanks located upon the El Camino Refining Company property, for the reason that the evidence before the Referee disclosed that the tax liens of [91] the United States were specific liens while those for the State of California were merely general or inchoate tax liens and said evidence disclosed that said cooling tower and oil and gasoline storage tanks were not affixed to the

real property covered by the mortgage of the Universal Consolidated Oil Company, and hence, were not subject to the lien of the mortgage held by said Universal Consolidated Oil Company.

4. The Referee in Bankruptcy erred in failing to hold and find that the United States was entitled to receive payment of its gasoline taxes for the months of October, 1941, to March, 1942, inclusive, in full before the State of California was entitled to receive anything from the bankrupt estate to apply upon the 1939 and 1940 California franchise taxes, for the reason that the evidence before the Referee disclosed that the said taxes due the United States were secured by special tax liens at the time of the filing of the Petition in Bankruptcy herein, while the taxes due the State of California have never been secured by anything but a general or inchoate lien.

Dated this 8th day of April, 1944.

Charles H. Carr—E. H.
CHARLES H. CARR,
United States Attorney.

E. H. Mitchell—E. H.
E. H. MITCHELL,
Assistant United States Attorney,
Eugene Harpole,
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue.

[Endorsed]: Filed April 10th, 1944. Ben E. Tarver,
Referee, by B. E. T.

[Endorsed]: Filed Jun 10, 1944. [92]

[Title of District Court and Cause.]

REFEREE'S AMENDMENTS TO CERTIFICATE
ON REVIEW.

The undersigned Referee in Bankruptcy, to whom was referred by the Court the above-entitled case for administration, hereby, pursuant to an Order of Court made herein on the hearing of the Review on July 24, 1944, respectfully presents herewith his Amendments to his Certificate on Review:

On March 3, 1944, the Referee made an Order herein determining the relativity of tax liens of the United States of America, and the State of California, and the lien of a mortgage held by the Universal Consolidated Oil Company, a corporation. Thereafter a Petition for a Review of such Order by the Judge was filed by the United States of America. The Referee then prepared and filed his Certificate on Review. The Review then came on for hearing before the Judge on July 24, 1944, at which time the Judge directed that the said Certificate on Review be re-referred to the Referee for amendments thereof in the particulars hereinafter stated.

1. The following portion of lines 7-10, page 3, of the said Certificate on Review is deleted:

"The amount of these State taxes was fixed and determined by the State of California prior to May 12 1942, the date of the commencement of this proceeding."

The following is inserted in lieu thereof:

"The bankrupt corporation filed its California Franchise Tax return for the taxable years 1939 and 1940, reporting its computation of income received during the income years of 1938 and 1939 and paid the taxes shown to be due for the taxable years 1939 and 1940

by said return. Thereafter and on January 3, 1941 the California Franchise Tax Commissioner under the provisions of Section [93] 25 of the Act (Act 8488 of Deering's General Laws for 1937) determined that additional income had been received and additional amounts of taxes were due and gave due notice to the bankrupt that the returns filed by the bankrupt had been examined and the correct amount of taxes determined by the Commissioner and that he proposed to assess additional taxes in specified amounts, giving the details of the proposed additional assessments and the method of computing the same. Thereupon the bankrupt filed a protest with the California Franchise Tax Commissioner. On March 12, 1942, the time of the commencement of the above-entitled proceeding under Chapter X of the Bankruptcy Act, said protest was pending for determination before the California Franchise Tax Commissioner. Thereafter and on August 13, 1942, the California Franchise Tax Commissioner redetermined the tax liability and reduced the amount of the additional taxes proposed in the said notices of January 3, 1941."

(Note: The change is made in subdivision (1) which comes after the following sentence in the first part of the Referee's Certificate "I—Statement of the Case": "The lien claims asserted against these funds were three.")

2. The following portion of lines 25-32, page 10, and lines 1-3, page 11, of the said Certificate on Review is deleted:

"The exact amount of these taxes were fixed and determined at a higher figure by the State of California prior to the commencement of this proceeding,

and on or about January 3, 1941. Thereafter the taxpayer protested the amount. On August 13, 1942, and after the commencement of this proceeding, the taxpayer was notified by the State of California that its protest was allowed in part and the tax originally fixed in said sum of \$1,406.12, for the calendar year 1939, and for the calendar year 1940 the sum of \$1,446.24. The said taxes bear interest at the rate of 6% per annum from the date of their accrual until paid."

The following is inserted in lieu thereof: [94]

"The bankrupt corporation filed its California Franchise Tax return for the taxable years 1939 and 1940, reporting its computation of income received during the income years 1938 and 1939 and paid the taxes shown to be due for the taxable years 1939 and 1940 by said returns. Thereafter and on January 3, 1941 the California Franchise Tax Commissioner under the provisions of Section 25 of the Act (Act 8488 of Deering's General Laws for 1937) determined that additional income had been received and additional amounts of taxes were due and gave due notice to the bankrupt that the returns filed by the bankrupt had been examined and the correct amount of taxes determined by the Commissioner and that he proposed to assess additional taxes in specified amounts, giving the details of the proposed additional assessments and the method of computing the same. Thereupon the bankrupt filed a protest with the California Franchise Tax Commissioner. On March 12, 1942, the time of the commencement of the above-entitled proceeding under Chapter X of the Bankruptcy Act, said protest was pending for determination before the California Franchise Tax

Commissioner. Thereafter and on August 13, 1942, the California Franchise Tax Commissioner reetermined the tax liability and reduced the amount of the additional taxes proposed in the said notices of January 3, 1941. The State taxes bear interest at the rate of six percent per annum, until paid, from March 15, 1939, and March 15, 1940, respectively. The said California tax law is also known as the Bank and Corporation Franchise Tax Act of the State of California."

(Note: The change is made near the middle of the Referee's Certificate on Review and appears under subdivision 3 under "III—Summary of Evidence.")

3. At the end of paragraph No. 3 of the "Summary of Evidence" the following is inserted:

"The said California tax law, section 11-(a) thereof, defines the words "income year" as follows: [95]

'The term "income year," as herein used, means the calendar year or the fiscal year ending during such calendar year, upon the basis of which the net income is computed herein. "Income year" includes, in the case of a return made for a fractional part of a year, the period for which such return is made.'

"The said California tax law, Section 11-(b) thereof, defines the words "taxable year" as follows:

'The term "taxable year," as herein used, means the calendar year, or the fiscal year ending during such calendar year, for which the tax is payable. A "taxable year" may constitute a period of twelve months or of less duration.'

"The said California tax law, Section 4-(7) thereof, states that the taxes due under Section 4, corpora-

tion and franchise taxes, shall accrue on the first day of the "taxable year" as defined in Section 11 of said California tax law."

(See, in connection with the foregoing amendments to the Referee's original Certificate on Review, Trustee's Exhibits Nos. 1 and 2 received in evidence by the Referee and sent up to the Judge in connection with such Certificate.)

Dated: This 5th day of August, 1944.

BEN E. TARVER

Referee in Bankruptcy.

The foregoing amendments to the Referee's Certificate on Review are hereby approved as to form:

REUBEN G. HUNT

REUBEN G. HUNT,

of Grainger and Hunt,

Attorneys for Trustee

CHARLES H. CARR—E.H.

United States Attorney

By EUGENE HARPOLE

EUGENE HARPOLE,

Attorney for United States of

America [96]

McINTYRE FARIES

McINTYRE FARIES,

of Faries and McDowell,

Attorneys for Universal Con-

Consolidated Oil Company

JOHN L. NOURSE

JOHN L. NOURSE,

Deputy Attorney-General,

Acting for Robert W. Kenny,

Attorney-General of California

[Endorsed]: Filed Aug. 11, 1944. [97]

In the District Court of the United States
Southern District of California
Central Division

No. 40,599-BH In Bankruptcy

In the Matter of

EL CAMINO REFINING COMPANY,

a corporation,

Bankrupt.

ORDER AFFIRMING ORDER OF REFEREE

Ben E. Tarver, a Referee in Bankruptcy of this Court, having made and entered herein on March 3, 1944, in the above-entitled matter pending before him, an Order fixing and determining the status and priority of certain tax liens asserted by the United States of America and the State of California against the funds of the estate of the above-named bankrupt and a mortgage lien asserted against said funds by Universal Consolidated Oil Company, a corporation, and thereafter the United States of America having filed herein a Petition for a Review of said Order by a Judge of the above-entitled Court, and the said Referee having thereafter filed herein his Certificate on Review and his Amendments to such Certificate, and the said Review having come on regularly for hearing before the above-entitled Court, Division of Judge Ben Harrison thereof, and having been argued and submitted to the Court for decision, the United States of America having been represented by Eugene Harpole on behalf of Charles H. Carr, United States District At-

torney for the Southern District of California, and the State of California having been represented by R. S. McLaughlin and John L. Nourse on behalf of Robert W. Kenny, Attorney-General of the State of California, and the Universal Consolidated Oil Company having been represented by McIntyre Faries on behalf of Faries & Mc-

Dowell, and Paul W. Sampsell, the Trustee in Bankruptcy herein, having been [98] represented by Reuben G. Hunt on behalf of Grainger and Hunt,

It Is Hereby Ordered that the said Order of the said Referee made and entered herein on March 3, 1944, be and the same is hereby affirmed.

It Is Hereby Further Ordered that the Findings of Fact and Conclusions of Law of the said Referee contained in his said Order of March 3, 1944, be and the same are hereby adopted by the above-entitled Court as its own Findings of Fact and Conclusions of Law in connection with said Order so affirmed.

Dated: This 7 day of September, 1944.

Ben Harrison

District Judge [99]

The foregoing Order is hereby approved as to form:

Reuben G. Hunt

REUBEN G. HUNT,

of Grainger and Hunt,

Attorneys for Trustee

CHARLES H. CARR—E. H.

United States Attorney.

By EUGENE HARPOLE,

Attorney for United States of
America

McIntyre Faries

McINTYE FARIES,

of Faries and McDowell,

Attorneys for Universal

Consolidated Oil Company

John L. Nourse

JOHN L. NOURSE,

Deputy Attorney-General,

Acting for Robert W. Kenny,

Attorney-General of California

Received copy of the within Order this 5th of September, 1944.

Eugene Harpole,

Attorney for United States.

Order entered Sep. 7, 1944. Docketed Sep. 7, 1944.
Book C. O. No. 27, page 615. Edmund L. Smith, Clerk,
by Murray E. Wire, Deputy.

[Endorsed]: Filed Sep. 7, 1944. [100]

[Title of District Court and Cause.]

ORDER FOR FILING TRUSTEE'S EXHIBITS ONE
AND TWO SPECIFIED IN REFEREE'S
AMENDED CERTIFICATE.

The above entitled matter came on for hearing before me on July 24, 1944 upon the Government's Petition for a Review of the Referee's Order subordinating its tax claims to the claims of the State of California for 1939 and 1940 franchise taxes. The State of California appeared by John L. Nourse, Assistant Attorney General of the State of California; Universal Consolidated Oil Company appeared by McIntyre Faries, Esq., its attorney; the Trustee in Bankruptcy, Paul W. Sampsell, appeared by Reuben G. Hunt, his attorney; the Government appeared by Eugene Harpole, Special Attorney, Bureau of Internal Revenue. In the course of the hearing it developed that the Referee in Bankruptcy had failed to send up the Trustee in Bankruptcy's exhibits 1 and 2, consisting of notices of additional franchise tax proposed to be assessed, No. 27,985 and 27,986 issued by the Franchise Tax Commissioner of the State of California under date of January 3, 1941, and of notice of action of the Franchise Tax Commissioner upon the taxpayer's protest to said notices of additional franchise tax. The latter notices being dated August 13, 1942. Copies of these exhibits acknowledged to be true [101] by all counsel present, were handed me during the course of the hearing. The Referee in Bankruptcy was thereupon directed to prepare and file an amendment to his Certificate on Review. He prepared

such a Certificate dated August 5, 1944, which was filed with the Clerk of this Court on August 11, 1944. The final paragraph of said amended certificate recites as follows:

“(See, in connection with the foregoing amendments to the Referee’s Original Certificate on Review, Trustee’s Exhibits Nos. 1 and 2 received in evidence by the Referee and sent up to the Judge in connection with such certificate.)”

It appears from the files of this Court that the Referee failed to send up said Trustee’s Exhibits 1 and 2 with either his original Certificate on Review, or the amendment thereof. Duplicates of these exhibits have been presented from the files of counsel for the Trustee in Bankruptcy.

It Is Therefore Ordered that the Clerk of this Court file the proffered copies of Trustee’s Exhibits 1 and 2 as of August 11, 1944, the date on which the Referee’s Amendment to his Certificate on Review was filed herein.

Dated: this 6th day of October, 1944.

Ben Harrison
District Judge

[Endorsed]: Filed Oct. 6, 1944. [102]

[TRUSTEE'S EXHIBIT NO. 1]

No. 27986

STATE OF CALIFORNIA
Office of
FRANCHISE TAX COMMISSIONER
Sacramento

Notice of additional
franchise tax proposed
to be assessed

El Camino Refining Company,
3970 Medford Avenue,
Los Angeles, Calif.

130331

Date: January 3, 1941

Bank and Corporation Franchise Tax return for the income year ended December 31, 1939 disclosing tax liability for the taxable year ended December 31, 1940, as transmitted by the above corporation has been examined and the correct amount of tax determined by the Commissioner, and it is proposed to assess an additional tax in the amount of \$2 052 58. The details of the proposed additional assessment and of computing said tax are set forth below.

Amount of tax must be made payable and transmitted to the Franchise Tax Commissioner by certified check or money order.

Interest must be added at six per cent per annum from the due date, March 15, 1940, to the date of payment.

Item 39	Net income per form 105	\$42 717 04
15	Compensation of officers:	
	As shown, \$68 458 33; should be,	
	\$24 000 00*	44 458 33

24	Deductible depreciation:		
	As shown, \$13 916 04; should be,		
	\$7,885 47*		6 030 57
26	Legal expense disallowed*		1 000 00
35	Deductible Dividends:		
	As shown Nil; should be \$174 38		-174 38
	Standard		
	Oil of		
	Calif. \$220 00 12.53%		27 57
	Universal		
	Consol.		
	Oil 400 00 36.702%		146 81
	\$620 00		\$174 38
	Revised Net Income		\$94 031 56
61	4%		3761 26
	Total tax assessed		3761 26
	Previously assessed		1708 68
	Additional tax		2052 58

[Written]: (180) Revised CAT CC 8/13/42

*As disclosed by Federal audit.

This notice of additional franchise tax proposed to be assessed is forwarded to the taxpayer whose name appears hereon in accordance with the provisions of the Bank and Corporation Franchise Tax Act, Section 25.
No. 40624

Interest

AB

As Called for Above Must Be Included
in Remittance

Chas. J. McColgan

Franchise Tax Commissioner

By CAT [103]

STATE OF CALIFORNIA
Office of
FRANCHISE TAX COMMISSIONER
Sacramento

Notice of additional
franchise tax proposed
to be assessed

El Camino Refining Company,
3970 Medford Avenue,
Los Angeles, Calif.

130331

Date: January 3, 1941

Bank and Corporation Franchise Tax return for the income year ended December 31, 1938 disclosing tax liability for the taxable year ended December 31, 1939, as transmitted by the above corporation has been examined and the correct amount of tax determined by the Commissioner, and it is proposed to assess an additional tax in the amount of \$2 214 50. The details of the proposed additional assessment and of computing said tax are set forth below.

Amount of tax must be made payable and transmitted to the Franchise Tax Commissioner by certified check or money order.

Interest must be added at six per cent per annum from the due date, March 15, 1939, to the date of payment.

Item 39	Net income per form 105	\$20 973 90
---------	-------------------------	-------------

15	Officers' compensation:	
----	-------------------------	--

	As shown	\$64 849 98; should be,
		\$20 000 00*

		44 849 98
--	--	-----------

A reasonable allowance for compensation of officers under Section 8(a) would appear to be \$20 000 00. Deduction in excess, deemed to be a distribution of net income.

35	Deductible dividends:	
	As shown, \$Nil; should be, \$23 34	-23 34
	Dividends are deductible only to the extent that the income of the declaring corporation has been included in the measure of the tax imposed by the Bank and Corporation Franchise Tax Act.	
	Standard Oil Co. of Calif.—	
	33.346% Deductible	
	(\$70 00 x 33.346%)	
24	Deductible depreciation:	
	As shown, \$17 069 79; should be, \$6,533 92*	10 535 87
		<hr/>
	Revised Net Income	\$76 336 41
61	4%	3 053 46
	Total tax assessed	3 053 46
	Previously assessed	838 96
	Additional tax	2 214 50

[Written]: (180) Revised CAT CC 8/13/42

*As disclosed by Federal audit

This notice of additional franchise tax proposed to be assessed is forwarded to the taxpayer whose name appears hereon in accordance with the provisions of the Bank and Corporation Franchise Tax Act, Section 25.

No. 40797

Interest

AB

As Called for Above Must Be Included
in Remittance

Chas. J. McColgan

Franchise Tax Commissioner

By CAT

[Endorsed]: Filed Aug. 11, 1944. [104]

[TRUSTEE'S EXHIBIT NO. 2]

[Written]: Trustee's Exhibit 1—8/31/43 J.W.

[Crest]

STATE OF CALIFORNIA
Office of
FRANCHISE TAX COMMISSIONER
Sacramento

Notice of Action of Franchise Tax
Commissioner Upon Taxpayer's
Protest

El Camino Refining Company
3970 Medford Avenue
Los Angeles, California

130331

Dated at Sacramento, California
August 13, 1942

You Are Hereby Notified, That pursuant to the terms of Section 25 of the Bank and Corporation Franchise Tax Act and the protest which you filed complaining of the computation and levy of your tax by the Franchise Tax Commissioner under said act as disclosed by return filed for the income year beginning January 1, 1939 and ended December 31, 1939, as set forth in Notice of Additional Franchise Tax Proposed to be Assessed, No. 27986, dated January 3, 1941, in the amount of \$2 052 58,

The computation and levy complained of have been reconsidered by the Franchise Tax Commissioner and he has acted upon said protest as follows:

In accordance with the information submitted to this office, tax liability has been redetermined in accordance with the following computation:

Item 39	Net income per form 105	\$42 717 04
15	Compensation of officers, as shown \$68 458 33; should be *\$36 000 00	32 458 33
24	Deductible Depreciation, as shown \$13 916 04; should be *\$11 043 97	2 872 07
	*Based on B. T. A. decision.	
26	Legal expense disallowed	1 000 00
35	Deductible dividends	-174 38
		<hr/>
	Revised Net Income	\$78 873 06
	4%	3 154 92
	Total tax assessed	3 154 92
	Previously assessed	1 708 68
	Revised additional tax	1 446 24

Interest has accrued on the deficiency at the rate of 6% per annum from March 15, 1940.

[Written]: 606.34 MD

138

Chas. J. McColgan

Franchise Tax Commissioner

By CAT

CAT:MD

cc - Latham & Watkins [105]

[Written]: Trustee's Exhibit #II—8/31/43 J.W.

[Crest]

STATE OF CALIFORNIA
Office of
FRANCHISE TAX COMMISSIONER
Sacramento

Notice of Action of Franchise Tax
Commissioner Upon Taxpayer's
Protest

El Camino Refining Company
3970 Medford Avenue
Los Angeles, California

130331

Dated at Sacramento, California
August 13, 1942

You Are Hereby Notified, That pursuant to the terms of Section 25 of the Bank and Corporation Franchise Tax Act and the protest which you filed complaining of the computation and levy of your tax by the Franchise Tax Commissioner under said act as disclosed by return filed for the income year beginning January 1, 1938 and ended December 31, 1938, as set forth in Notice of Additional Franchise Tax Proposed to be Assessed, No. 27985, dated January 3, 1941, in the amount of \$2 214 50,

The computation and levy complained of have been reconsidered by the Franchise Tax Commissioner and he has acted upon said protest as follows:

In accordance with the information submitted to this office, tax liability has been redetermined in accordance with the following computation:

Item 39	Net income per form 105	\$20 973 90
15	Compensation of officers, as shown	
	\$64 849 98; should be *\$36 000 00	28 849 98
24	Deductible Depreciation, as shown	
	\$17 069 79; should be *\$10 743 38	6 326 41
	*Based on B. T. A. decision.	
35	Deductible dividend	-23 34
		<hr/>
	Revised Net Income	\$56 126 95
	4%	2 245 08
	Total tax assessed	2 245 08
	Previously assessed	838 96
	Revised additional tax	1 406 12

Interest has accrued on the deficiency at the rate of 6% per annum from March 15, 1939.

[Written]: 808.38 MD

138

Chas. J. McColgan

Franchise Tax Commissioner

By CAT

CAT:MD

cc - Latham & Watkins

[Endorsed]: Filed Aug. 11, 1944. [105-A]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, a creditor and tax claimant in the above-entitled bankruptcy proceeding, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Southern District of California, dated September 7, 1944, affirming the Order entered by Referee in Bankruptcy, Ben E. Tarver, on March 3, 1944, wherein it was held that the claims and liens of the United States for Federal gasoline taxes were subordinate to the claims and liens of the State of California for franchise taxes. The order hereby appealed from was entered September 7, 1944. [106]

Dated: October 6. 1944.

Charles H. Carr,—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell,—E. H.

E. H. MITCHELL,

Assistant United States Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant

[Endorsed]: Filed & mailed copies to Reuben G. Hunt, McIntyre Faries & Robert Kenny, Atty. Gen., Oct. 6, 1944. [107]

[Title of District Court and Cause.]

APPELLANT'S AMENDED STATEMENT OF
POINT TO BE URGED UPON APPEAL.

The appellant by this, its amended statement of points to be urged upon appeal from the Order of the above-entitled Court dated September 7, 1944, states that it intends to rely upon the following points in its said appeal:

I.

That the District Court and the Referee in Bankruptcy erred in subordinating the tax liens of the United States which were in existence before the date of bankruptcy and secured payment to it of the then assessed gasoline taxes for the months of October, 1941 to March, 1942, inclusive, in the aggregate amount of \$28,824.90, to the liens of the State of California, securing payment to it of 1939 and 1940 franchise taxes, for the reason that said tax liens of the United States were [108] specific, whereas the liens of the State of California securing the 1939 and 1940 franchise taxes were mere general inchoate liens.

II.

That the District Court and the Referee in Bankruptcy erred in failing to hold and find that the United States was entitled to receive payment of its gasoline taxes for the months of October, 1941 to March, 1942, inclusive, in full before the State of California was entitled to receive anything from the bankrupt estate to apply upon the 1939 and 1940 California franchise taxes, for the reason that the evidence before the Court and the Referee in Bankruptcy disclosed that the said taxes due the United States were secured by specific tax liens at the time of the filing of the petition in bankruptcy herein, while the

taxes due the State of California have never been secured by anything but a general or inchoate lien.

III.

The District Court and the Referee in Bankruptcy erred in allowing interest to Universal Consolidated Oil Company, subsequent to the date of the adjudication in Bankruptcy, upon the debt due it and secured by a mortgage upon the real property of the bankrupt, El Camino Refining Company, a corporation.

IV.

The District Court and the Referee in Bankruptcy erred in subordinating the tax liens of the United States, which were in existence before the date of bankruptcy and secured payment to it of the then assessed gasoline taxes for the months of October, 1941 to March, 1942, inclusive, in the aggregate amount of \$28,824.90, to the payment of interest accrued, after the date of adjudication of El Camino Refining Company, a bankrupt, upon the debt due Universal Consolidated Oil Company from the bankrupt and secured by a mortgage upon the bankrupt's real property. [109]

V.

The District Court and the Referee in Bankruptcy erred in allowing interest to Universal Consolidated Oil Company upon the debt due it from the bankrupt and secured by a mortgage upon the bankrupt's real property, after said Universal Consolidated Oil Company had consented that the trustee in bankruptcy might sell said mortgaged real property.

VI.

The District Court and the Referee in Bankruptcy erred in subordinating the tax liens of the United States, which

were in existence before the date of bankruptcy and secured payment to it of the then assessed gasoline taxes for the months of October, 1941 to March, 1942, inclusive, in the aggregate amount of \$28,824.90, to the payment of interest accrued, after Universal Consolidated Oil Company had consented that the Trustee in Bankruptcy might sell the real property of the bankrupt upon the debt due said Universal Consolidated Oil Company from El Camino Refining Company and secured by a mortgage upon the said bankrupt's real property.

VII.

The District Court and the Referee in Bankruptcy erred in allowing interest to Universal Consolidated Oil Company, upon the debt due it from the bankrupt and secured by a mortgage upon the bankrupt's real property, after the date said real property had been sold by the Trustee in Bankruptcy with the consent of the mortgagee, Universal Consolidated Oil Company.

VIII.

The District Court and the Referee in Bankruptcy erred in subordinating the tax liens of the United States which were in existence before the date of bankruptcy and secured payment to it of the then assessed gasoline taxes for the months of October, 1941 to March, 1942, [110] inclusive, in the aggregate amount of \$28,824.90, to the payment of interest accrued, after the real property of the bankrupt had been sold by the Trustee in Bankruptcy with the consent of Universal Consolidated Oil Company, the mortgagee, upon the debt due Universal Consolidated Oil Company from El Camino Refining Company and secured by a mortgage upon said bankrupt's real property.

IX.

The District Court and the Referee in Bankruptcy erred in allowing attorneys' fees to counsel of Universal Consolidated Oil Company, the mortgagee.

Dated: this 3d day of November, 1944.

Charles H. Carr—E. H.

CHARLES H. CARR,

United States Attorney

E. H. Mitchell—E. H.

E. H. MITCHELL,

Assistant United States Attorney

George M. Bryant

GEORGE M. BRYANT,

Assistant United States Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

Received copy of the within this 3rd day of November, 1944.

Robert W. Kenny,

Attorney General

Per L. M. A.

Attorney for Appellees.

Received copy of the within Appellant's Am. St. etc. this 4rd day of Noember, 1944.

Reuben G. Hunt, (M. K. F.)

Attorney for Bankrupt

Received copy of the within this 3 day of November, 1944.

Faries & McDowell

By McIntyre Faries

Attorney for Universal Cons. Oil Co.

[Endorsed]: Filed Nov. 4, 1944. [111]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 115 inclusive contain full, true and correct copies of Petition for Reorganization of a Corporation under Chapter X of the Bankruptcy Act; Order Approving Petition and Continuing Debtor in Possession; Order Adjudging Debtor Bankrupt and Directing that Bankruptcy be Proceeded With; Referee's Certificate on Review; Petition of Trustee for Determination of Tax and Labor Claims and Demands; Order to Show Cause; Amended Claim of Franchise Tax Commissioner of the State of California; Claim of United States for Taxes; Statement of the Nature of Tax Claims of the Collector of Internal Revenue; Return of the State of California in Response to Order to Show Cause Issued August 11, 1943; Answer to Order to Show Cause; Letter dated September 20, 1943; Closing Brief of the State of California; Findings of Fact, Conclusions of Law and Order; Petition for Review of Referee's Order; Referee's Amendments to Certificate on Review; Order Affirming Order of Referee; Order for Filing Trustee's Exhibits One and Two Specified in Referee's Amended Certificate; Trustee's Exhibits 1 and 2; Notice of Appeal; Appellant's Amended Statement of Points to be Urged upon Appeal; Appellant's Amended Designation of Record on Appeal and Order re Time to Docket Appeal which constitute the

record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 22 day of November, 1944.

[Seal]

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Endorsed]: No. 10932. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy of the Estate of El Camino Refining Company, State of California and Universal Consolidated Oil Company, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 24, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10932

In the Matter of

EL CAMINO REFINING COMPANY,
a corporation,

Bankrupt.

UNITED STATES OF AMERICA,

Appellant,

- v -

PAUL W. SAMPSELL, Trustee in Bankruptcy, STATE
OF CALIFORNIA and UNIVERSAL CONSOLI-
DATED OIL COMPANY,

Appellees.

STATEMENT OF POINTS RELIED UPON ON
APPEAL

The appellant states that it intends to rely in its appeal from the Order of the United States District Court dated September 7, 1944, upon the points mentioned in the amended statement of points relied upon by appellant, found at pages 100 to 103 of the Transcript of Record on said Appeal, inclusive.

Dated: this 21st day of November, 1944.

Charles H. Carr—E. H.
CHARLES H. CARR,
United States Attorney

E. H. Mitchell—E. H.
E. H. MITCHELL,
Asst. United States Attorney

George M. Bryant—E. H.
GEORGE M. BRYANT,
Asst. United States Attorney
Eugene Harpole
EUGENE HARPOLE,
Special Attorney
Bureau of Internal Revenue
Attorneys for Appellant.

Received a copy of the within Statement of Points this
21st day of November, 1944.

Robert W. Kenny
Attorney General
John L. Nourse
Deputy
Attorney for State of California

Received copy of the within Statement of Points this
21st day of November, 1944.

Faries & McDowell
By McIntyre Faries
Attorney for Universal Consolidated
Oil Company.

Received copy of the within Statement of Points this
21st day of November, 1944.

Reuben G. Hunt (MKF)
Attorney for Trustee in
Bankruptcy.

[Endorsed]: Filed Nov. 24, 1944. Paul P. O'Brien,
Clerk.

No. 10,932.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of El Camino Refining Company, STATE OF CALIFORNIA and UNIVERSAL CONSOLIDATED OIL COMPANY,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR THE UNITED STATES.

SAMUEL O. CLARK, JR.,

Assistant Attorney General.

SEWALL KEY,

A. F. PRESCOTT,

LEONARD SARNER,

Special Assistants to the Attorney General.

CHARLES H. CARR,

United States Attorney,

E. H. MITCHELL,

Assistant United States Attorney.

EUGENE HARPOLE,

Special Assistant to the Chief Counsel Bureau of Internal Revenue.

FILED

APR - 3 1945

PAUL P. O'BRIEN,
CLERK

United States Postoffice and
Courthouse Bldg., Los Angeles (12),

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No. 10,932.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of El Camino Refining Company, STATE OF CALIFORNIA and UNIVERSAL CONSOLIDATED OIL COMPANY,

Appellees.

Upon Appeal from the District Court of the United States
for the Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court entered no opinion.

Jurisdiction.

This case involves a contest between lien claimants, including the United States for gasoline taxes for various months of the years 1941 and 1942, over the assets of the bankrupt, the El Camino Refining Company. The original petition for reorganization of the debtor under Chapter X of the Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, was filed on May 12, 1942. [R.

2-7.] The claim of the United States was filed on July 3, 1942. [R. 52-53.] The order of the referee was filed on March 2, 1944. [R. 76-77.] The petition for review of the referee's order was filed on April 10, 1944. [R. 78-80.] The order of the District Court, affirming the order of the referee, was entered on September 7, 1944. [R. 86-87], and the notice of appeal was filed on October 6, 1944 [R. 99]. The jurisdiction of this Court rests upon Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the District Court erred in holding that under Section 67 of the Bankruptcy Act the liens of the United States for gasoline taxes were not entitled to priority in payment over the inchoate general liens of the State of California for franchise taxes.

2. Whether the District Court erred in allowing interest to the Universal Consolidated Oil Company on the principal sum due under its mortgage, subsequent to the date of adjudication in bankruptcy, or sale, with the mortgagee's consent, of the mortgaged property free and clear of all liens.

3. Whether the District Court erred in subordinating the tax liens of the United States to the payment of attorney's fees and interest on the principal sum due under the mortgage to the Universal Consolidated Oil Company subsequent to the date of adjudication in bankruptcy.

Statutes Involved.

The applicable statutes involved are set forth in the Appendix, *infra*, pp. 31 to 35.

Statement.

The District Court adopted as its own the findings of fact and conclusions of law contained in the referee's order of March 2, 1944. [R. 87.] As relevant to this appeal they may be summarized as follows:

On May 12, 1942, the El Camino Refining Company filed its petition for reorganization under Chapter X of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938. The court thereupon, and on the 12th day of May, 1942, made an order to the effect that this petition was properly filed and was filed in good faith, and continuing the debtor corporation in possession of its assets. Thereafter, and on the 8th day of March, 1943, an order was made adjudicating the corporation a bankrupt, and referring further proceedings in the administration of its estate to Ben E. Tarver, a referee in bankruptcy. Thereafter, and on the 27th day of March, 1943, Paul W. Sampsell, with the approval of the referee, was appointed trustee in bankruptcy of the estate, and thereafter and on the 31st day of March, 1943, duly qualified. Ever since the 31st day of March, 1943, Paul W. Sampsell has been, and now is, the duly appointed, qualified and acting trustee in bankruptcy of the estate. [R. 61.]

The assets of the bankrupt estate consisted of real and personal property. By the consent of all lien claimants, all of this property, real and personal, has been sold for \$19,927.85 under the direction and control of the Court. The sale has been consummated and the purchase price paid to the trustee. By the consent of all lien claimants, and with the approval of the trustee and the Court, all liens claimed upon the property have been transferred to the fund realized from the sales, subject to such ex-

penses of administration fixed by the Court, after due notice, which arise out of the costs and expenses of the preservation of the property, its liquidation and reduction to cash, the determination of the status and relativity of liens asserted upon this cash, and the proper distribution of such cash among the persons entitled to share in it. [R. 62-63.]

On April 3, 1943, the State of California, by and through the California State Franchise Tax Commissioner, filed a claim for franchise taxes in the sum of \$3,701.35, plus interest. This claim was based upon the following items: (1) taxes accruing as of January 1, 1939, for the calendar year 1939, in the sum of \$1,406.12; and (2) taxes accruing as of January 1, 1940, for the calendar year 1940, in the sum of \$1,446.24. The exact amount of these taxes was not fixed and determined at the time they accrued but were fixed and determined prior to the commencement of the bankruptcy proceedings.¹

¹Although the findings of fact apparently were not amended, the referee, pursuant to direction of the Court, amended his certificate of review by deleting the above sentence and substituting in lieu thereof the following [R. 81-82]:

The bankrupt corporation filed its California Franchise Tax return for the taxable years 1939 and 1940, reporting its computation of income received during the income years of 1938 and 1939 and paid the taxes shown to be due for the taxable years 1939 and 1940 by said return. Thereafter and on January 3, 1941 the California Franchise Tax Commissioner under the provisions of Section 25 of the Act (Act 8488 of Deering's General Laws for 1937) determined that additional income had been received and additional amounts of taxes were due and gave due notice to the bankrupt that the returns filed by the bankrupt had been examined and the correct amount of taxes determined by the Commissioner and that he proposed to assess additional taxes in specified amounts, giving the details of the proposed additional assessments and the method of computing the same. Thereupon the bankrupt filed a protest with

[R. 65.] After the commencement of the bankruptcy proceedings, and during their course, after consideration of a protest made by the bankrupt corporation, the amounts of such taxes, so fixed and determined prior to bankruptcy, were voluntarily reduced by the State of California to the sums of \$1,406.12, as of January 1, 1939, and \$1,446.24, as of January 1, 1940. The above taxes bear interest at the rate of 6% per annum from the date of their accrual until paid. The amount due thereon, principal and interest, as of January 15, 1944, is the sum of \$3,634.22, plus interest thereon thereafter at the rate of 6% per annum until paid. [R. 65.]

On May 10, 1943, after proceedings had and taken for that purpose, and after due notice to all parties in interest, the referee made an order allowing to Universal Consolidated Oil Company, a corporation, a secured claim upon the real property, by reason of a real property mortgage thereon, in the principal sum of \$8,444.08, with interest thereon thereafter, at the rate of 5% per annum from March 15, 1943, until paid. This mortgage was executed and delivered on January 10, 1941, by the bankrupt corporation to the Universal Consolidated Oil Company, and thereafter recorded on May 3, 1943,² in Book

the California Franchise Tax Commissioner. On March 12, 1942, the time of the commencement of the above-entitled proceeding under Chapter X of the Bankruptcy Act, said protest was pending for determination before the California Franchise Tax Commissioner. Thereafter and on August 13, 1942, the California Franchise Tax Commissioner redetermined the tax liability and reduced the amount of the additional taxes proposed in the said notices of January 3, 1941.

²This appears to be an error, the correct date of record being May 3, 1941. [R. 29.]

1089, at page 508, in the official records of Orange County, California. The mortgage secures the payment of a promissory note executed and delivered by the bankrupt to the Universal Consolidated Oil Company on January 10, 1941. [R. 66.]

The note provides: "Should it become necessary to bring action for the collection of this note, the maker hereby agrees to pay a reasonable attorney's fee to be fixed by the Court." [Rec. 66.] The mortgage provides that it secures the payment to the mortgagee of [R. 66-67.]

attorney's fees in a reasonable sum to be fixed by the court in any action brought to foreclose this mortgage, or in any action or proceeding affecting or purporting to affect the security of this mortgage or the right of mortgagee hereunder, in which mortgagee may appear, whether brought by mortgagor or mortgagee, or whether such foreclosure action, or other action, or proceedings progress to judgment.

The balance due, as of January 15, 1944, upon the note and mortgage, principal and interest, exclusive of attorney's fees, is the sum of \$10,484.78, plus interest thereon thereafter at the rate of 5% per annum until paid. The mortgage was contested before the referee on the hearings, by the United States of America, which contended that this mortgage insofar as it covered the machinery, fixtures and equipment upon the oil refinery plant, purported to be a chattel mortgage covering personal property, and that such machinery, fixtures and equipment were personal property instead of real property. The mortgagee employed the law firm of Faries & McDowell of Los Angeles to represent the mortgagee in connec-

tion with the foreclosure of the mortgage in the bankruptcy proceedings, and to defend its validity as a real property mortgage, the lien of which was entitled to be satisfied out of the proceeds of such sale of the oil refinery, subject only to any prior valid liens thereon established by the court, and the expenses of administration fixed and allowed by the court. The above counsel rendered valuable services in connection with such matters. These services are of the reasonable value of \$750. Due notice of the time and place of the hearing of the application of the firm of Faries & McDowell for the allowance of \$750 for their services in this connection, was given to the creditors of the bankrupt estate by mail, pursuant to the provisions of Section 58 of the Bankruptcy Act. Upon the hearing of this application, no objection was made thereto. [R. 67.]

The bankrupt has, at all times since the close of the following months, been indebted to the United States of America for gasoline taxes in the amounts set forth below, together with interest thereon as provided by law. [R. 69.] The assessment lists of the Commissioner of Internal Revenue, carrying these taxes, were received by the Collector of Internal Revenue, at Los Angeles, California on the following dates [R. 70]:

Month	Amount of Tax	Assessment List Received
October, 1941	\$ 301.16	January 6, 1942
November, 1941	6,301.31	January 23, 1942
December, 1941	3,751.83	March 24, 1942
January, 1942	6,090.77	April 28, 1942
February, 1942	6,335.70	May 8, 1942

A claim for these federal gasoline taxes was filed on June 20, 1942. [R. 70.]

On December 23, 1943, the referee signed filed and entered an order allowing and ordering paid out of the estate forthwith the total sum of \$6,929.83 as expenses of administration of the type and character hereinbefore referred to. There will not be sufficient funds in the estate wherewith to pay such expenses of administration, and the valid liens of the State of California, and of the Universal Consolidated Oil Company. There will be sufficient money in the estate to pay such expenses of administration so allowed, and the tax liens of the State of California hereinbefore referred to, and a substantial sum in connection with the mortgage lien of the Universal Consolidated Oil Company hereinbefore referred to. There will be other expenses of administration of the same type and character which will, necessarily, be allowed and paid before the closing of this case. There will not be left any funds on hand wherewith to pay any valid liens of the United States of America for taxes, or any debts entitled to priority of payment pursuant to Section 64-a of the Bankruptcy Act other than expenses of administration, or any claims of general creditors against the bankrupt estate. [R. 74.]

The referee then concluded and ordered that [R. 76-77]:

- (1) The State of California holds a valid first lien upon the funds now in the hands of the Trustee

in Bankruptcy in the sum of \$3,634.22, as of January 15, 1944, plus interest thereon thereafter at the rate of 6% per annum until paid.

(2) The Universal Consolidated Oil Co., a corporation, holds a valid second lien upon such funds in the sum of \$11,234.78, as of January 15, 1944, plus interest thereon thereafter at the rate of 6% per annum until paid.

(3) Both the said first and the said second lien are subject to the payment of the expenses of administration fixed by the court herein, after hearing upon due notice to the parties herein, which arise out of the costs and expenses of the property affected by such liens, its liquidation and reduction into cash, the determination of the status and relativity of the liens asserted upon such cash, and the proper distribution of said cash among the persons entitled to the same. If the assets of the estate are insufficient to pay such liens and such expenses, then such expenses shall first be paid, next the said first lien of the State of California, and then the balance remaining to the Universal Consolidated Oil Co. in connection with its said second lien.

(4) No further consideration need be given to the validity or amount of any tax liens asserted upon the funds of the estate by the United States of America, unless it ultimately appears that there will be sufficient funds in the estate to pay all such expenses of administration and said first and second liens of the State of California and the Universal Consolidated Oil Co. in full.

From the order of the District Court affirming this order the United States Government prosecutes this appeal.

Statement of Points to Be Urged.

The appellant's statement of points to be urged, all of which are here relied upon, appear in the record at pages 100 to 103. They may be summarized by the statement that the District Court erred in holding that the United States was not entitled to priority in payment for gasoline taxes out of the bankrupt estate over the claims of the State of California for franchise taxes, and of the Universal Consolidated Oil Company for interest and attorney's fees relating to its mortgage.

Summary of Argument.

The issue on this phase of the appeal deals with the relative priorities of the State of California and the United States as *lien* claimants of a bankrupt. The Government's liens for gasoline taxes attached at the times the Collector received the assessment lists which, in a sufficient number of instances were prior to the filing of the petition on May 12, 1942. They were specific, perfected liens which did not have to be recorded to be valid against a state and which could not be displaced by later liens imposed by authority of any state law or judicial decision. On the other hand at the times the Government's liens attached, California had at most inchoate general liens for franchise taxes. They were uncertain as to amount and property subject thereto. Although this did not deprive them of being valid liens under Section 67(b) of the Bankruptcy Act, it did deprive them of being specific and perfect. And it is submitted that under Section 67 of the Bankruptcy Act, in a contest between a prior inchoate lien holder and the Government as a tax lien claimant, the Government takes priority whether or not the inchoate lien is subsequently perfected.

Moreover *United States v. Texas*, 314 U. S. 480, conclusively answers the contention that since the mortgage was conceded to prime the Government's tax liens and the state liens were entitled to be satisfied under California law before the mortgage, the state liens were entitled to first priority. Despite the circuitry, the United States tax liens are still entitled to be satisfied before the tax liens of California. Since the mortgage is ahead of the Government's liens, the Government urges that the procedure inferentially approved in *Spokane County v. United States*, 279 U. S. 80, and which will satisfy the relative priorities of California and the mortgagee be here adopted, and that the amounts finally allowable to the mortgagee be paid first and the tax liens of the United States thereafter, with a provision that the State of California satisfy its tax claims out of the amounts allowable to the mortgagee.

The Government recognizes that the general rule that interest stops running upon both secured and unsecured claims after a debtor has passed into bankruptcy unless the estate turns out to be solvent, is limited by the exception in favor of the secured creditor whose security is sufficient to pay his claim for interest as well as principal. However, the exception applies only where the contest is between the secured and general creditors and not between two lien holders on the same property, as is the case here. Just as priority claims not secured by liens are not granted interest unless the principal of all claims may be paid in full, so where property is subject to two liens interest will not run on the superior to the detriment of the principal of the second. Thus the court was in error to allow interest to the mortgagee from the date

of the petition to the detriment of the principal sum to the United States as the second lienor.

But there is a more fundamental reason why, aside from any question of insolvency, the mortgagee is not entitled to subordinate the United States tax liens to a greater sum than existed on the date the Government's liens attached. Although Congress may have subordinated its tax lien to a prior existing mortgage, the lien cannot be displaced without its consent by increasing the amount of the prior incumbrance by the accrual of interest or the addition of attorney's fees for services to be rendered in the future pursuant to state law or a judicial decision. And neither the interest nor the attorney's fee can be said to be an incident of and relate back to the original debt for the doctrine of relations will not divest the United States of its priorities.

Moreover in no event can interest accrue in bankruptcy after the completion of the sale of the mortgaged property with the consent of the mortgagee. In accordance with the general rule applicable to receivership, assignment for the benefit of creditors, and judicial sale proceedings, the bankruptcy rule is clear that when the court with the mortgagee's consent orders a sale free of liens, the latter to attach to the proceeds of the sale, even as against general creditors, interest does not run beyond the day the purchaser at the sale has paid the purchase price in full, even though the proceeds are sufficient to meet further claims:

ARGUMENT.

I.

The Tax Liens of the United States Were Entitled to Priority in Payment Over the Tax Liens of the State of California.

The question on this phase of the appeal is whether the claim of the United States can be subordinated to any sum greater than the amount properly allowable to the Universal Consolidated Oil Company on its mortgage. Specifically the issue deals with the relative priorities of the State of California and the United States as *lien* claimants. The Government's liens [Sections 3670-3672, Internal Revenue Code, Appendix, *infra*] for gasoline taxes due under Section 3412 (a) of the Internal Revenue Code [Appendix, *infra*] attached in sufficient sums for purposes of this appeal prior to the filing of the petition on May 12, 1942. [R. 70.]³ It is the Government's position that at the time the Government's liens attached the State of California had at most inchoate unperfected liens for franchise taxes under Sections 25 and 29 of the California Franchise Tax Act [Appendix, *infra*] and that in a contest in bankruptcy between a prior inchoate lienholder and the Government as a tax *lien claimant*, the Government takes priority regardless of whether the inchoate lien is subsequently perfected.

In general, lien claimants fall under Section 67 of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938 [Appendix, *infra*], and must be

³Where bankruptcy follows a petition for reorganization under Chapter X, the crucial date is still the filing of the original petition under Chapter X, Section 238 of the Bankruptcy Act; *In re Columbia Ribbon Co.*, 117 F. (2d) 999 (C. C. A. 3d).

paid in advance of unsecured claims arising under Section 64. [Appendix *infra*.] *City of Richmond v. Bird*, 249 U. S. 174; *In re Brannon*, 62 F. (2d) 959 (C. C. A. 5th). Unsecured claims for taxes are afforded a fourth priority under Section 64 and claimants share pro rata. *Missouri v. Ross*, 299 U. S. 72. But a lien creditor under Section 67 is ahead of tax claimants without liens under Section 64 (*City of Richmond v. Bird*, *supra*; *Miners Sav. Bank of Pittston, Pa. v. Joyce*, 97 F. (2d) 973, 974 (C. C. A. 3d)), and the tax lien under Section 67 takes precedence over the priorities under Section 64, with the possible subordination exceptions of Section 67 (c) ((*Ingram v. Coss County, Or.*, 71 F. (2d) 889 (C. C. A. 9th); *In re Empire Granite Co.*, 42 F. Supp. 450)). An inchoate lien for taxes is still a statutory lien protected by Section 67 (b) and is ahead of any claim for taxes without a lien under Section 64. *In re Knox-Powell-Stockton Co.*, 100 F. (2d) 979 (C. C. A. 9th). And this is so even if the unsecured tax claimant is the United States, for Section 3466, Revised Statutes, does not apply. *In re Knox-Powell-Stockton Co.*, *supra*; *United States Fidelity & Guaranty Co. v. Sweeney*, 80 F. (2d) 235 (C. C. A. 8th); *Reese, Inc. v. United States*, 75 F. (2d) 9 (C. C. A. 5th). But this merely means that the Bankruptcy Act sets up its own priorities, and since any lien under Section 67, even unperfected, is preferred to an unsecured claim, though a priority, under Section 64, the United States cannot insist upon the priority of Section 3466, Revised Statutes, which does not create a lien. *Bramwell v. U. S. Fidelity Co.*, 269 U. S. 483, 488.

The nature of the Government's lien for taxes has been judicially settled. After demand it arises at the time the

assessment list was received by the Collector. (Sections 3670-3671, Internal Revenue Code; *In re Lambertville Rubber Co.*, 111 F. (2d) 45 (C. C. A. 3d); *Metropolitan Life Ins. Co. v. United States*, 107 F. (2d) 311 (C. C. A. 6th); *In re Fahnestock Mfg. Co.*, 7 F. (2d) 777 (W. D. Pa.); *Citizens State Bank of Barstow, Tex. v. Vidal*, 114 F. (2d) 380 (C. C. A. 10th); *cf. MacKenzie v. United States*, 109 F. (2d) 540 (C. C. A. 9th)). It is a specific perfected lien (*United States v. City of Greenville*, 118 F. (2d) 963 (C. C. A. 4th)) which cannot be displaced by later liens imposed by the authority of any state law or judicial decision (*Michigan v. United States*, 317 U. S. 338). Except for failure to record as to specific enumerated classes, it is good against a subsequent state lien regardless of state priorities, takes precedence over a prior inchoate state tax lien (*United States v. Reese*, 131 F. (2d) 466 (C. C. A. 7th)), and may possibly have priority over a previously perfected lien (*Michigan v. United States*, *supra*), though possibly not over a mortgage (*Metropolitan Life Ins. Co. v. United States*, *supra*; *Ormsbee v. United States*, 22 F. (2d) 926 (S. D. Fla.)).

Questions concerning inchoate general liens have generally arisen with regard to the application of Section 3466, Revised Statutes (*United States v. Waddill, Holland & Flinn* (U. S. Sup. Ct.), decided January 2, 1945 (1945 P-H, par. 72,008); *United States v. Texas*, 314 U. S. 480; *New York v. Maclay*, 288 U. S. 290; *Spokane County v. United States*, 279 U. S. 80); and Section 67 (b) of the Bankruptcy Act (*In re Knox-Powell-Stockton Co.*, *supra* (old Section 67 (d))); *City of New Orleans v. Harrell*, 134 F. (2d) 399 (C. C. A. 5th); *City of New York v. Hall*, 139 F. (2d) 935 (C. C. A. 2d)). In general they

may be defined as caveats of more perfect liens to come, either because the amount of, or the property subject to, the lien is not fixed or certain.

It is submitted that the proper application of the above principles to the facts at bar irrefutably leads to the conclusion that the Government's *liens* for gasoline taxes were entitled to be satisfied before the franchise tax liens of the State of California. There can be little argument over the fact that the California liens were inchoate and general at the time of the filing of the petition on May 12, 1942. Section 4 (3) of the California Franchise Tax Act provides that the tax is to be measured by the corporation's net income computed upon the basis of its preceding fiscal or calendar year; that is, the 1939 and 1940 corporate franchise taxes here involved were measured by the net income of the El Camino Refining Company for the years 1938 and 1939. Section 7 provides that the franchise tax shall accrue on the first day of the "taxable year," the year when the tax is payable. (Section 11 (b).) Corporations are required to file a return within two months and fifteen days after the close of their income year (Section 13) and to pay the tax reported on the return (Section 23). However, Section 25 [Appendix, *infra*], provides that if the franchise tax commissioner determines that the tax disclosed by the original return is less than the tax disclosed by his examination, he shall mail notice of the additional tax *proposed to be assessed*, and that within sixty days the taxpayer may file a protest against the levy of the *proposed additional tax* as computed by the commissioner. If no protest is filed, the amount of the tax is final upon the expiration of a sixty day period. But if the taxpayer files a protest within

sixty days, it is then the duty of the commissioner to reconsider his computation of the tax complained of, and the commissioner's action upon the protest becomes final upon the expiration of thirty days from the date when he mails the taxpayer a notice of his action. After the deficiency is determined and the tax becomes final, the commissioner must mail notice of demand for the payment thereof and the tax is due and payable ten days later. It is further provided that upon the adjudication of bankruptcy of any taxpayer, any deficiency determined by the franchise tax commissioner in respect to the tax imposed by the Act *may be immediately assessed*. Section 29 [Appendix, *infra*] creates the lien that secures payment of the taxes. The taxes constitute a lien upon the real property of the taxpayer, which lien has the same force, effect and priority as a judgment lien, and attaches on the first day of the taxable year.

The El Camino Refining Company filed its California franchise tax returns for the taxable years 1939 and 1940, reporting its computation of income received during the income years of 1938 and 1939, and paid the taxes shown to be due for the taxable years 1939 and 1940 by the returns. [R. 81-82.] Thereafter, on January 3, 1941, the California franchise tax commissioner, under the provisions of Section 25 of the Act, determined that additional income had been received and additional amounts of taxes were due, and gave notice to the bankrupt that the returns filed by the bankrupt had been examined, the correct amount of taxes determined by the commissioner, and that he *proposed to assess additional taxes*. [Trustee's Ex. No. 1, R. 91-94.] At this moment no tax was final under Section 25. Moreover, the bankrupt filed a protest with

the California franchise tax commissioner [R. 82], and on May 12, 1942, the protest was still pending. It was not until August 13, 1942,⁴ that the tax liability was finally redetermined. No assessment was made prior to the petition in bankruptcy and no tax was due and payable until ten days from the time the notice and demand was sent out on August 13, 1942. [Trustee's Ex. No. 2, R. 95-98.] Thus, although the liens attached pursuant to Section 29 as of the first day of 1939 and 1940, the amount of their liability was unliquidated and unknown. This did not deprive them of being valid liens within Section 67 (b) of the Bankruptcy Act (*In re Knox-Powell-Stockton & Co.*, *supra*; *United States v. Reese*, 131 F. (2d) 466 (C. C. A. 7th)); but it did deprive them of being specific and perfect. Moreover, by Section 29 of the California Franchise Tax Act, the liens have the same force, effect and priority as judgment liens. Even had their amount been liquidated prior to bankruptcy, they still would have been merely the general lien of a judgment which requires seizure or the equivalent to remove it from the category of an inchoate or floating lien. *Thelusson v. Smith*, 2 Wheat. 396, 426; *New York v. Maclay*, *supra*; *In re Lincoln Chair & Novelty Co.*, 274 N. Y. 353. Hence, under any analysis, the State of California had but inchoate general liens uncertain as to amount and property subject thereto.

On the other hand, the liens of the United States were specific and perfect (*United States v. City of Greenville*, *supra*; *Michigan v. United States*, *supra*), arising at the

⁴The State of California did not file its claim in the bankruptcy proceeding for these taxes until April 3, 1943. [R. 65.] The United States filed its claim on June 20, 1942. [R. 70.]

times the assessment lists were received by the Collector,⁵ which in a sufficient number of instances were prior to the filing of the petition. [R. 70.] And the liens were valid as against the State of California even though they were not recorded pursuant to Section 3672 of the Internal Revenue Code [R. 35], since a state is not among the classes enumerated in and protected by the statute.⁶ *United States v. San Juan County*, 280 Fed. 120 (W. D. Wash.); *Hopkins v. Eureka Coal Co.* (C. C. Kanawha Co., W. Va.), decided February 25, 1944 (1944 P-H, par. 92,496); *State v. Wynne*, 113 S. W. (2d) 325 (Tex. Civ. App.), reversed on other grounds, 133 S. W. (2d) 951 (Tex. Sup. Ct.); see also *Investment & Securities Co. v. United States*, 140 F. (2d) 894 (C. C. A. 9th); *In re Dartmont Coal Co.*, 46 F. (2d) 455 (C. C. A. 4th).

⁵Demand for payment required by Section 3670 of the Internal Revenue Code, which need not be a formal demand (*In re Baltimore Pearl Hominy Co.*, 5 F. (2d) 553 (C. C. A. 4th), is evidenced by the admission in the original petition [R. 4], or, since Section 67 (b) of the Bankruptcy Act now expressly allows statutory liens to be perfected after bankruptcy, by the claim filed on June 20, 1942. [R. 70.] Under old Section 67 (d) several courts had held that statutory liens could not be perfected after bankruptcy. See *City of New Orleans v. Harrell*, 134 F. (2d) 399 (C. C. A. 5th).

⁶Although there is no contest with the trustee in bankruptcy, who represents the United States as well as other creditors, the liens obviously were good against him without recording. The trustee in bankruptcy likewise is not specifically listed in the enumerated classes of those to whom Congress has consented to be subordinated, and under Section 70 (c) of the Bankruptcy Act, he is not actually a judgment creditor as to property in the possession of the bankrupt. He is merely a creditor holding a lien by legal or equitable proceedings, and the Bankruptcy Act clearly recognizes the difference between the two types of creditors, for in the same section the trustee is constituted a judgment creditor as to all other property not in the bankrupt's possession or otherwise coming into the possession of the bankruptcy court.

The question is thus narrowed down to the priority between the specific tax liens of the United States and the inchoate general judgment liens of the State of California. The *In re Knox-Powell-Stockton Co.* case, *supra*, gives no answer, for it merely held that a state inchoate tax lien good under Section 67 (b) was superior to a United States *unsecured* tax priority claim under Section 64. But *United States v. Reese*, 131 F. (2d) 466 (C. C. A. 7th), *supra*; and *Michigan v. United States*, *supra*, do supply the answer. In the *Reese* case, which involved a dispute between two *lien* claimants in *bankruptcy*, the inchoate tax liens of the state attached in April of 1930 and 1931 while the Government's specific tax lien did not arise until December, 1931. The taxes due the State of Illinois were uncertain in amount at all times prior to the date of inception of the Government's lien though they were made certain thereafter. The court by analogy to Section 3466, Revised Statutes, held that the United States was prior in time and therefore superior in dignity, which priority could not be defeated by any doctrine of relation back. 4 Collier on Bankruptcy (1944 Supp.) in stating as part of his treatise that (p. 14)—

If the United States had a *lien* for taxes pursuant to federal law then it should be valid in bankruptcy under §67b and should take precedence over the state tax lien if the federal statutes give it precedence,
* * *

comments on the *Reese* case as follows (p. 13):

In *United States v. Reese* (C. C. A. 7th, 1942), 51 Am. B. R. (N. S.) 660, 131 F. (2d) 466, the court held that a tax *lien* of the United States was entitled to precedence over an Illinois real property tax lien by virtue of 36 U. S. C., §191. To give this section

such effect in determining the ranking of *liens* is, of course, consistent with the holding that the section does not in bankruptcy give the government *without a lien* precedence over a lien, or in other words §191 gives only a fifth priority to an *unsecured* claim of the United States.

And in the *Michigan* case, *supra*, also a tax lien case, the Supreme Court also drew upon the analogy to the priority of payment demanded by Section 3466, Revised Statutes, and left open the question of the supremacy of the federal lien over a *previously perfected state lien*, thus lending support to the view that a previously inchoate general state lien must fall before the federal tax lien.

Moreover, *United States v. Texas*, 314 U. S. 480, conclusively answers any argument which the State of California may advance that since the mortgage was conceded to prime the Government's tax liens and the state liens for franchise taxes were entitled to be satisfied under California law before the mortgage, the state liens were entitled to first priority. In the *Texas* case a receiver was appointed for a gasoline distributor at the suit of a chattel mortgagee. Texas and the United States then intervened with claims for state and federal gasoline taxes. The District Court held that the mortgagee was to be first satisfied, then the United States under Section 3466, Revised Statutes, and finally the claims of Texas. But pursuant to a ruling of the Texas Supreme Court which held (133 S. W. (2d) 963) that the Texas statute gave its lien first rank over prior mortgagees and the United States claim, the order of distribution was entered to be: Texas, the mortgagee, then the United States. Certiorari was granted on the petition of

the United States which did not seek to disturb the superior rights of the mortgagee. The only question before the United States Supreme Court was the relative priority of the claims of the United States and Texas. The Court held the United States was entitled to priority over Texas. And it did so in light of the binding construction of the Texas Supreme Court of its local statute that the state lien was to be preferred over the mortgage and whether or not the mortgage was entitled to priority over the United States. Thus the State of California cannot successfully claim to be entitled to payment before the United States because it asserts a state priority over the mortgagee.

It should be noted that the Government in the case at bar does not assert that because it primes the state liens which in turn are superior to the mortgage, it should be paid first. This was the solution of the Court of Civil Appeals of Texas when the *Texas* case, *supra*, was sent back to it on remand, for it said (*State v. Nix*, 159 S. W. (2d) 214):

It has thus been determined by the State Supreme Court that Dailey's * * * claim is inferior to that of the State of Texas, and the U. S. Supreme Court has held that the State's claim is inferior to that of the Federal Government. The funds in the treasury of the trial court are insufficient to satisfy the judgment in favor of the Federal Government and no necessity arises for apportioning any deficit after payment of the judgment due the Federal Government.
* * *

* * * That part of the judgment giving priority to the State of Texas over the judgment in favor of the Federal Government will be reformed and prior-

ity will be given to the latter over the former. * * *.

In this appeal, both Howard Dailey and the State have lost as against the Federal Government; the State has prevailed over Dailey.

The Government, however, urges that the procedure inferentially approved in *Spokane County v. United States*,⁷ 279 U. S. 80, and specifically followed in *Hopkins v. Eureka Coal Co.*, *supra*, be adopted here. In the *Eureka Coal Company* case, which involved *tax liens*, the Government recognized the priority of the mortgagee's lien which was inferior to the state consumer's sales tax liens, yet successfully claimed precedence over the state liens. The court directed that the mortgagee's lien be satisfied first, United States next, and the State third, with a provision for setting aside any amounts which should go to the mortgagee to satisfy the state taxes. So here the amount finally to be allowed to the Universal Consolidated Oil Company should be paid first and the tax liens of the United States thereafter, with a provision that the State of California satisfy its tax claims out of the amounts allowable to the mortgagee.⁸

⁷Moreover, it is contended by the Government that the relative priorities could have been maintained . . . by setting apart sufficient funds to pay the mortgage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart.

⁸Aside from the question of the supremacy of the federal tax lien, the courts have been struggling over the "circuity of liens" and "priorities puzzle" for more than two and a half centuries. See Note, 38 Col. L. Rev. 1267 (1938). In cases such as the one at bar where California has a lien superior to that of the mortgagee, the mortgagee has a lien superior to that of the United States, and the United States has a lien superior to that of California, normal common law rules would subordinate California to both the mortgagee and the United States. See Glenn, Mortgages, Sec.

II.

It Was Error to Allow Interest to the Mortgagee Subsequent to the Date of Adjudication in Bankruptcy or Sale of the Mortgaged Property, With Its Consent, and to Subordinate the Tax Liens of the United States to Such Payments.

The District Court awarded to the mortgagee, the Universal Consolidated Oil Company, the principal sum due on its mortgage as of the date of the petition in May, 1942—some \$8,000—plus interest until the date of payment.⁹ By consent of all the lien claimants including the mortgagee, the security had been sold free and clear of all liens, which were transferred to the funds realized from the completed sales. See *Van Huffel v. Harkelrode*, 284 U. S. 225. It is submitted, therefore, that not only was it error to subordinate the Government's specific tax liens to the payment of any interest from the moment the liens attached, but under the ordinary rules applicable to bankruptcy, no interest was properly allowable after the filing of the petition or surely after the consummated sales of the mortgaged property.

375, and cases there collected; Benson, *Circuitry of Liens—Problem in Priorities*, 19 Minn. L. Rev. 139 (1935). The Fifth Circuit's treatment of the problem where city taxes were involved (*City of New Orleans v. Harrell*, 134 F. (2d) 399 (C. C. A. 5th)) is criticized in 4 Collier on Bankruptcy (1944 Supp.) 13. However, the criticism is not applicable to the instant case, since the supremacy of the federal tax lien was not there involved, and unlike the *New Orleans* case, all the contestants here claim liens on real estate which by consent and not the automatic provision of Section 67 (b) have all been subordinated to the same expenses of administration. [R. 62.]

⁹The addition of the \$750 attorney's fees to the principal sum will be discussed subsequently.

We of course recognize that the general rule that interest stops running upon both secured (*Brown v. Leo*, 34 F. (2d) 127 (C. C. A. 2d)) and unsecured claims after a debtor has passed into bankruptcy unless the estate turns out to be solvent (*Sexton v. Dreyfus*, 219 U. S. 339; *Am. Iron Co. v. Seaboard Air Line*, 233 U. S. 261), is limited by the exception in favor of the secured creditor whose security is sufficient to pay his claim for interest as well as principal. (*Coder v. Arts*, 213 U. S. 223; *People's Homestead Ass'n v. Bartlette*, 33 F. (2d) 561 (C. C. A. 5th); *In re Gotham Can Co.*, 48 F. (2d) 540 (C. C. A. 2d); see *Ticonic Bank v. Sprague*, 303 U. S. 406; *Louisville Bank v. Bradford*, 295 U. S. 555, 557.) However, the exception is itself circumscribed where the contest is not between secured and general creditors but between two lienholders on the same property, as is the case here. Just as priority claims not secured by liens are not granted interest unless principal of all claims may be paid in full (*Fordyce v. Kansas City & N. Connecting R. Co.*, 145 Fed. 566 (C. C. W. D. Mo.)), so where property is subject to two liens, interest will not run on the superior to the detriment of the principal of the second. (*Lerner Stores Corp. v. Electric Maid Bake Shops*, 24 F. (2d) 780 (C. C. A. 5th); but see *Wilson v. Dewey*, 133 F. (2d) 962 (C. C. A. 8th.). In *People's Homestead Ass'n v. Bartlette*, *supra*, where interest was allowed the mortgagee after bankruptcy on the proceeds realized from the sale of the security until the time the vendee paid the purchase price, the court expressly distinguished the situation in the *Lerner* case, *supra*, as one involving a contest between two secured creditors and not similar to that involved in the case it was then deciding where the issue arose between general claimants and a mortgagee. Thus,

in the case at bar, the court was in error to allow interest to the mortgagee from the day of the petition to the detriment of the principal sum due the United States as the second lienor.

But there is a more fundamental reason why, aside from any question of insolvency, the mortgagee is not entitled to subordinate the United States tax liens to a greater sum than existed on the date the Government's liens attached.¹⁰ At that moment since there was no equity in the property for the bankrupt, the property had in a sense two owners, the mortgagee to the extent of its debt, and the United States to the extent of its liens. See *United States v. City of Greenville*, 118 F. (2d) 963 (C. C. A. 4th). Although Congress may have subordinated its tax lien to a prior existing mortgage, the lien cannot be displaced without its consent by increasing the amount of the prior incumbrance by the accrual of interest pursuant to state law or judicial decision. See *Michigan v. United States*, 317 U. S. 338. As the Supreme Court in the *Michigan* case, *supra*, which also involved a tax lien, drew upon the analogy of decisions interpreting the priority of payment demanded by Section 3466, Revised Statutes, so here the interest cannot be said to be an incident of and relate back to the original debt, for the doctrine of relation will not divest the United States of its priority. *New York v. Maclay*, 288 U. S. 290. Since the mortgage was filed prior to the inception of the Government's lien, it is beyond argument that the notice provisions of Section 3672 of the Internal Revenue Code, which are to protect subsequent mortgagees, have no application to the case at bar. See *In re Van Winkle*,

¹⁰In accordance with the fourth assignment of error, interest accruing up to the date of adjudication is not attached.

49 F. Supp. 711, 713 (W. D. Ky.); *Cf. United States v. Beaver Run Coal Co.*, 99 F. (2d) 610 (C. C. A. 3d); *Ormsbee v. United States*, 23 F. (2d) 926 (S. D. Fla.). Accrual of interest on the mortgage debt is not within the classes enumerated in and protected by the statute. See *MacKenzie v. United States*, 109 F. (2d) 540 (C. C. A. 9th).

But in no event can interest accrue in bankruptcy after the completion of the sale of the mortgaged property with the consent of the mortgagee. Obviously, if the sale results in a deficiency, the mortgagee is a common creditor, *ad hoc*; and when he seeks to prove against the general estate for the deficiency claim as a debt, interest stops at the point where it halts as to other general debts, the day of the filing of the petition. *Sexton v. Dreyfus*, *supra*. However, when the court with the mortgagee's consent¹¹ orders a sale free of liens, the latter to attach to the proceeds of the sale, even as against general creditors, interest does not run beyond the day the purchaser at the sale has paid the purchase price in full, even though the proceeds are sufficient to meet further claims. *Coder v. Arts*, 213 U. S. 223, *supra*, affirming 152 Fed. 943 (C. C. A. 8th). Thus, in *In re Stevens*, 173 Fed. 842 (Ore.), where the mortgaged property was sold free of liens and the referee allowed

¹¹That the consent of the lienholder to a sale free of liens may subject him to liability for a part of the general administration expenses which he otherwise would not have to share, see *Tawney v. Clemson*, 81 F. (2d) 301 (C. C. A. 4th).

interest to date of adjudication only, the court held that interest ceased only when the trustee received the proceeds of the sale of the property, and that the bankrupt estate ought not to be burdened with the payment of interest subsequent to that time. And in *People's Homestead Ass'n v. Bartlette*, *supra*, where the referee awarded interest to date of sale, the appellate court allowed it to run until the time the purchaser paid the purchase price.¹² Compare *Phoenix Bldg. & Homestead Ass'n v. E. A. Carrere's Sons*, 33 Fed. (2d) 563 (C. C. A. 5th), (interest not contested on appeal); *In re Hershberger*, 208 Fed. 94 (M. D. Pa.); *San Antonio Loan & Trust Co. v. Booth*, 2 Fed. (2d) 590 (C. C. A. 5th). Thus, even if the United States were treated purely as an unsecured creditor the District Court was in error to award interest on the principal of the mortgage up to the date of payment to the mortgagee.

¹²This is in accordance with the general rule applicable to insolvency and judicial sale proceedings. Thus, in *Roos v. Fairy Silk Mills*, 342 Pa. 81, a receivership case where land subject to two mortgages was sold by order of court, it was held that interest ceased on the first mortgage at the date of payment of the purchase price despite litigation between the first and second mortgagees, instituted by the second, as to their respective rights to the proceeds of the sale, and against the contention of the first mortgagee that interest should run to date of distribution. To the same effect is *Meister v. J. Meister, Inc.*, 103 N. J. Eq. 78. The date of final confirmation by the court of the sale of the assignor's real estate by his assignee for benefit of creditors under order of court is the time for interest on liens to cease (*Carver's Appeal*, 89 Pa. 276), and interest in such a case does not run to date of distribution of the proceeds of the sale (*Estate of John Strickler*, 13 Phila. 504). And interest ceases to run on liens discharged by a sheriff's execution sale of real property on the date of the sale and not the date of distribution. *Potter v. Langstruth*, 151 Pa. 216.

III.

The Tax Liens of the United States Were Entitled to Be Satisfied Ahead of the Attorney's Fees Awarded to the Mortgagee.

The mortgage provided that it was to secure payment of attorney's fees for services rendered in any (R. 66)—

action brought to foreclose this mortgage, or in any action or proceeding affecting or purporting to affect the security of this mortgage or the rights of the mortgagee hereunder * * *.

The attorneys for the mortgagee had participated in the sale of the mortgaged property and represented the mortgagee in successfully upholding against the contention of the United States its claim to a lien on the oil refinery property. For these services \$750 was awarded by the referee and made a part of the lien of the mortgage. Although applicable California law designating attorney's fees secured by the mortgage as part of the principal lien (*County Bank v. Goldstree*, 129 Cal. 161) will be recognized as a component part of the valid lien in bankruptcy (*Security Mortgage Co. v. Powers*, 278 U. S. 149), it is the Government's contention that once the Government's lien attached, it was subordinated only to the amount then due on the mortgage. As was argued in the discussion of the interest issue in Part II, *supra*, this sum could not be opened up and increased by attorney's fees for services to be performed in the future by any doctrine of relation back.

Conclusion.

The judgment of the District Court is incorrect and should be reversed.

Respectfully submitted,

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March, 1945.

APPENDIX.

Internal Revenue Code, [as amended by Sec. 521 (a) (20) of the Revenue Act of 1941, c. 412, 55 Stat. 687]:

SEC. 3412. TAX ON GASOLINE.

(a) There shall be imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of $1\frac{1}{2}$ cents a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

* * * * *

(26 U. S. C. 1940 ed., Sec. 3412.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1940 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1940 ed., Sec. 3671.)

SEC. 3672. [as amended by Sec. 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

(26 U. S. C. 1940 ed., Sec. 3672.)

Deering, California General Laws (1939 Supp.):

Act 8488. Bank and Corporation Franchise Tax Act:

SEC. 25. *Examination of returns and proceedings thereafter: Notice of additional tax.* As soon as practicable after the return is filed, the commissioner shall examine it and shall determine the correct amount of the tax. If the commissioner determines that the tax disclosed by the original return is less than the tax disclosed by his examination he shall mail notice to the taxpayer at its post-office address (which must appear on its return) of the additional tax proposed to be assessed against it. Such notice shall set forth the details of the proposed additional assessment and of computing said tax.

Protest by taxpayer. Within sixty days after the mailing of said notice the taxpayer may file with the commissioner a written protest against the levy of the proposed additional tax, as computed by the commissioner, specifying therein the grounds upon which the protest is based. The protest must be under oath.

Hearing and appeal. If no such protest is so filed the amount of the tax shall be final upon the expiration of said sixty-day period. If a protest is so filed it shall be the duty of the commissioner to reconsider the computation and levy of the tax complained of, and if the taxpayer has so requested in its protest, it shall be the duty of the commissioner to grant said taxpayer, or its authorized representatives, an oral hearing. After consideration of the protest and the evidence adduced in the event of such oral hearing, the commissioner's action upon the protest shall be final upon the expiration of thirty days from the date when he mails to the taxpayer notice of his action, unless within that thirty-day period the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization. The appeal must be addressed and mailed to the State Board of Equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. Said board shall hear and determine the same and thereafter shall forthwith notify the taxpayer and the commissioner of its determination, and the reasons therefor. Such determination shall be final upon the expiration of sixty days from the time of such determination unless within such sixty-day period the determination is modified in which event it shall become final upon the expiration of sixty days from the time it is modified.

Deficiency notice. When a deficiency has been determined and the tax has become final under the provisions of this section, the commissioner shall mail notice and demand to the taxpayer for the payment thereof, and such tax shall be due and payable at the expiration of ten days from the date of such notice and demand.

* * * * *

Bankruptcy of taxpayer. Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the commissioner in respect of a tax imposed by this act upon such taxpayer may be immediately assessed. * * *

SEC. 29. *Lien of tax: Inception and duration: Release of lien: Prerequisites to dissolution of taxpayer.*

(a) The taxes imposed by this act shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien and shall attach on the first day of the "taxable year," * * *.

* * * * *

Bankruptcy Act of 1898, c. 541 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840:

SEC. 64. *Debts Which Have Priority.* a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * *

* * * * *

(11 U. S. C. 1940 ed., Sec. 104.)

SEC. 67. *Liens and Fraudulent Transfers.*

* * * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

* * * * *

(11 U. S. C. 1940 ed., Sec. 107.)

No. 10,932

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

PAUL W. SAMPSELL, Trustee in Bankruptcy
of the Estate of El Camino Refining
Company, STATE OF CALIFORNIA and UNI-
VERSAL CONSOLIDATED OIL COMPANY,

Appellees.

BRIEF FOR APPELLEE STATE OF CALIFORNIA.

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APR 28 1945

PAUL P. O'BRIEN,
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IN THE
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UNITED STATES OF AMERICA,

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Appellees.

BRIEF FOR APPELLEE STATE OF CALIFORNIA.

QUESTION PRESENTED.

This brief deals only with the first question discussed in the government's brief. Strictly speaking, that question is: "Is a lien of the United States for gasoline taxes entitled to priority in bankruptcy over an earlier, but inchoate, lien for California Franchise Taxes?"

STATUTES INVOLVED.

The statutes involved are printed in the Appendix.

STATEMENT.

The State of California does not controvert the government's statement of the case, but for convenience we are setting forth the essential facts at this point.

El Camino Refining Company filed a petition for reorganization under Chapter X of the Bankruptcy Act on May 12, 1942. It was adjudicated bankrupt on March 27, 1943, and its assets have been sold free and clear of liens.

There are three lien claims which exceed the value of the assets of the estate.

(1) The claim of the State of California for franchise taxes of the taxable years 1939 and 1940 amounting to \$3634.22 together with interest at the rate of 6% per annum from January 15, 1944, until paid. This lien attached in part on the first day of January, 1939 and in part on January 1, 1940. (Bank and Corporation Franchise Tax Act, Section 26.) It was not determined as to amount until August 13, 1942.

(2) The claim of the Universal Consolidated Oil Company allowed in the sum of \$11,234.78, together with interest, based upon a mortgage executed on January 10, 1941 and recorded May 3, 1941.

(3) The claim of the United States for gasoline taxes in a sum in excess of \$20,000. The lien for these taxes attached on several dates between January 6, 1942 and June 18, 1942.

The District Court concluded that the liens were entitled to priority in the order in which they attached

and since the assets were insufficient to pay both the State's claim and the mortgagee's claim in full did not pass upon the legality of the government's claim.

SUMMARY OF THE ARGUMENT.

The question involved is one of statutory construction. Neither the Bankruptcy Act nor the Internal Revenue Code grants the United States priority over the states. The lien of the State of California is valid and must be recognized in bankruptcy. In this case it is first in time and it is therefore first in right.

The authorities cited by the government are of no assistance in interpreting Sections 3670-72 of the Internal Revenue Code. Section 3466 of the Revised Statutes differs materially from the statutes involved here and cases interpreting it are not in point.

ARGUMENT.

A. CONGRESS HAS NOT MADE THE LIEN OF THE UNITED STATES SUPERIOR TO INCHOATE LIENS.

The State is well aware of the fact that the Constitution "and the laws of the United States which shall be made in pursuance thereof" are the supreme law of the land. Congress unquestionably could provide that a lien of the United States for taxes or other debts should be paramount over all other liens, including state taxes.

But Congress has not done so. It has, on the contrary, provided that the liens of the United States shall be subordinate to certain types of liens, including, we believe, prior liens for state taxes whether such liens are perfected or inchoate.

The government's claim of priority does not rest upon the Bankruptcy Act, for that act merely provides that valid liens (including liens for State and Federal taxes) shall be recognized by the Bankruptcy Court. The act gives no lien priority over another. It recognizes so-called inchoate liens as well as perfected liens for it permits the perfection of liens for taxes after bankruptcy. As the government now concedes, this point was conclusively determined against it in the case entitled *In re Knox-Powell-Stockton* (9 Cir.), 100 Fed. (2d) 979. That case involved a number of tax liens arising under California law, all of which, including a lien for franchise taxes, were inchoate. This Court held that all of the claims were valid liens and were entitled to priority over unsecured claims, including an unsecured claim of the United States for taxes.

The government's lien is created by Sections 3670-3672 of the Internal Revenue Code (Revised Statutes Sec. 3186; U.S.C. 3670-3672) and its claim for priority also rests upon those sections. The three sections in substance provide that if a tax is not paid it shall be a lien; that the lien shall arise at the time the assessment list is received by the collector; and that the lien "shall not be valid as against any mortgagee,

pledgee, purchaser, or judgment creditor" until notice thereof has been filed by the collector with certain local officials or with the clerk of the District Court.

The history of the three sections is set forth in *United States v. Beaver Run Coal Co.* (5 Cir.), 99 Fed. (2d) 610, 612:

"Ever since the Act of July 13, 1866 (14 Stat. 107) the United States has been given a lien for unpaid taxes. Section 3186, Revised Statutes, 26 U.S.C.A., Secs. 1560, 1561, 1562. As amended in 1879, and prior thereto, Section 3186 contained no provisions for the recording or filing of the lien, but merely provided as follows: 'If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person.' 20 Stat. 331, 26 U.S.C.A., Sec. 1560 note.

"On May 1, 1893, the United States Supreme Court, in the case of *United States v. Snyder*, 149 U.S. 210, 13 S. Ct. 846, 37 L. Ed. 705, held that the lien created by the above section was not subject to the recording laws of the states, and that it was enforceable even against a subsequent bona fide purchaser for value without notice. This decision cast a cloud of uncertainty upon titles to land throughout the United States and, before long, under the leadership of the American Bar Association, agitation for remedial legislation began. By the Act of March 4, 1913, Congress

amended section 3186 by adding thereto a provision 'that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until' certain recording and filing requirements, thereafter set forth, had been fulfilled. 37 Stat. 1016, 26 U.S.C.A., Sec. 1560 note.

"This section, with minor amendments, has ever since been retained on the statute books. The latest amendment, made by the Act of May 29, 1928, 45 Stat. 875, 26 U.S.C.A., Sec. 1560 et seq., sets forth the provisions applicable to this case
* * *".

The statute was again amended in 1936 (49 Stat. 1921) and is set forth in the appendix in its present form. The changes then made are not material here.

It will be seen that the language of Section 3672 is subject to the construction that the tax lien upon recording would not only become valid as against mortgagees and judgment creditors, but would also become paramount (i.e., superior to earlier liens). However, the language has been interpreted at all times to mean that the lien of the United States is inferior to all mortgage and judgment liens acquired prior to the date of recording or filing of the notice.

Trust Company of Texas v. United States, 3 Fed. Supp. 683;

Fox v. Queens County Sales Co., Inc. (D. C.), 52 Fed. (2d) 794;

Sherwood v. U. S. (D. C.), 5 Fed. (2d) 991;

Integrity Trust Co. v. United States, 3 Fed. Supp. 577;

Minnesota Mutual Life Insurance Co. v. U. S. (D. C.), 47 Fed. (2d) 942.

These decisions are consistent with the general rule that a lien is not paramount unless the statute compels that conclusion. (Cf. *Home Owners Loan Corp. v. Hansen*, 38 C. A. (2d) 478, 102 Pac. (2d) 417.)

It will be noted that Section 3671 also refers to the time when the lien arises. This is the time at which the government's lien takes effect. It has been held that the government's lien is subject to all liens upon the property in existence at the time the government's lien arose. Thus in *United States v. City of Greenville* (5 Cir.), 118 Fed. (2d) 963, 966, the Court said:

“Whether the lien provided by the statute is entitled to priority over antecedent liens for taxes duly perfected by states or municipalities is a question which is not before us and which we need not decide. It would seem, however, that the lien was intended to attach to the property of the taxpayer subject to existing encumbrances; and this is borne out by the provision that it shall not be valid as against mortgagees, purchasers or judgment creditors until notice thereof is duly filed as provided by the act. This interpretation places liens of the federal government and liens of the states on an equal basis for the application of the principle first in time, first in right (*Rankin v. Scott*, 12 Wheat. 177, 179, 6 L. Ed. 592), which is the principle ordinarily applied with respect to priority of liens, and the one applied between a tax lien and other liens where the tax lien is not made paramount by statute. 61 C. J. p. 934.”

If the 1913 amendment adding Section 3672 had been intended only to protect mortgagee, judgment

creditors and bona fide purchasers (as the government contends) Section 3671 would have been unnecessary. Section 3671 was included to protect the holders of statutory and equitable liens acquiring their liens prior to receipt of the assessment list by the collector. The government acquires no interest in the property of the taxpayer until that event occurs and that interest is subject to all existing encumbrances.

Certainly there is nothing in Sections 3670 to 3672 to support the government's position that perfected liens (other than the liens of mortgagees and judgment creditors) are protected by Section 3671, but that so-called inchoate liens are not.

**B. THE AUTHORITIES CITED BY THE GOVERNMENT
ARE NOT IN POINT.**

1. United States v. Texas.

The government places its principal reliance upon cases such as *United States v. Texas*, 314 U. S. 480, interpreting Section 3466 of the Revised Statutes. (31 USC 1940 Ed. Sec. 191.) That section provides in substance that when a debtor is insolvent or has committed an act of bankruptcy, the United States shall be first paid. This statute is controlling in equity receiverships and is also controlling where the debtor executes an assignment for the benefit of his creditors. It is not controlling in bankruptcy cases. In the case entitled *In re Knox-Powell-Stockton*, 100 Fed. (2d) 979, this Court said (p. 982):

“To support its position that section 67d preserves only ‘perfected’ liens, appellant cites: *Spokane County v. United States*, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621; *New York v. Maclay*, 288 U. S. 290, 53 S. Ct. 323, 77 L. Ed. 754, and *Gerson, Beesley & Hampton v. Shubert Theatre Corp.*, D. C. S. D. N. Y. 1934, 7 F. Supp. 399. All of these cases arose under section 3466 of the Revised Statutes, 31 U.S.C.A. Sec. 191, which grants priority to the United States over all other creditors when the debtor is insolvent. The cited cases establish that under this section an inchoate lien will not defeat the priority established by said section. But this being a bankruptcy proceeding, the provisions with respect to priority under section 3466 of the Revised Statutes do not apply here. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, supra; *Davis v. Pringle*, supra; *Claude D. Reese, Inc. v. United States*, 5 Cir. 1935, 75 F. 2d 9. And in construing section 67d of the Bankruptcy Act our inquiry as to what constitutes a lien thereunder is not embarrassed by the auxiliary consideration as to whether the lien of a tax not presently enforceable is sufficient to avail against a statutory preference which is to be liberally construed in favor of the United States. *Spokane County v. United States*, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621, quoting *Price v. United States*, 269 U. S. 492, 499, 46 S. Ct. 180, 70 L. Ed. 373.”

Section 3466 of the Revised Statutes contains no exceptions; it simply declares that upon insolvency the United States shall be first paid.

In *United States v. Texas*, 314 U. S. 480, the Court not only held that the priority of the United States cannot be defeated by general and inchoate liens, but also questioned the soundness of early decisions holding that the mortgagee is entitled to priority over the United States. It was said that in several early cases "this Court read an exception into the section in the case of previously executed mortgages * * * this doctrine seems to have been based on the theory that mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor."

In *Spokane County v. United States*, 279 U. S. 80, the Court held that the lien of the county for property taxes was not specific and was inchoate and was therefore insufficient to take the property out of the estate of taxpayer. This, in substance, is the reason why the Court has drawn a distinction between perfected liens and inchoate liens in cases arising under Section 3466. It was thought that a perfected lien might be sufficient to take the property out of the estate of the taxpayer so as to avoid the effect of Section 3466, but it was held that a general and inchoate lien was insufficient for this purpose.

2. *Michigan v. United States.*

The government also relies upon the case of *Michigan v. United States*, 317 U. S. 338. In that case the government's lien arose under Section 315a of the Revenue Act of 1926. (26 USC 253.) A full discussion of that statute will be found in the companion case of *Detroit Bank v. United States*, 317 U. S. 329.

Section 315(a) of the Revenue Act gives the United States a lien for estate taxes. The lien attaches to the gross estate of the decedent on the date of his death. The only exception contained in this statute is a provision protecting bona fide purchasers of property transferred *inter vivos* by the taxpayer.

In the *Detroit Bank* case a widow executed a mortgage after the death of her husband and prior to the assessment of additional estate taxes against his estate by the United States. It was held that the inchoate lien of the government was entitled to priority over the mortgage. The Court rejected the argument that Section 3672 of the Internal Revenue Code required the filing of notice of estate tax liens to protect mortgagees. Indeed, the Court's decision is based upon the fact that the lien for estate taxes was inchoate and entirely different in character from the lien created by Sections 3670 to 3672.

In *Michigan v. United States*, the Court simply applied the same rule to property taxes which became a lien after the government's inchoate lien attached. The Court then stated that it was unnecessary to pass upon the question of whether or not the government's inchoate lien would take precedence over earlier perfected liens for taxes and cited in that connection cases arising under Section 3466 of the Revised Statutes. The Court plainly indicated that the answer to this question was to be found by ascertaining the intent of Congress, not by applying any rule of thumb that state liens are always inferior to liens of the United States.

3. **United States v. Reese.**

Finally, the government relies upon *United States v. Reese* (7 Cir.), 131 Fed. (2d) 466. In that case the government commenced an action to foreclose a lien for income taxes which had attached on December 7, 1931. The taxpayer was adjudicated bankrupt on July 3, 1936.

An examination of the opinion discloses that the Court did not discuss the language or effect of Sections 3670-3672 but that it assumed without discussion that cases decided under Section 3466 of the Revised Statutes were controlling. With but two exceptions, none of the cases cited by the Court arose in bankruptcy proceedings and none of the cases cited dealt with the priority liens of the United States under Sections 3670-3672 as amended in 1913.

One of the cases cited by the Court was *United States v. Fisher*, 2 Cranch 358, which was decided in 1805, when the Bankruptcy Act provided in part "that nothing contained in this law shall in any manner affect the rights of preference to prior satisfaction of debts due to the United States, and secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States, or to any of them".

The Court also cited *United States v. National Surety Company*, 254 U. S. 73. This was a bankruptcy case, but it did not deal with the matter of the priority of liens of the United States.

The United States Supreme Court has twice held that Section 3466 of the Revised Statutes does not apply in bankruptcy proceedings.

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152;

Davis v. Pringle, 268 U. S. 315.

As previously pointed out, this Court reached the same conclusion in the case entitled *In re Knox-Powell-Stockton Co.*, 100 Fed. (2d) 979.

Under these circumstances it is submitted that the *Reese* case is not controlling. It not only fails to consider the applicable provisions of the governing statute but it relies upon authorities which the Courts have been repeatedly held to be inapplicable in bankruptcy.

The government concedes that a tax lien perfected before its lien arises is entitled to priority. It has made the same concession in other cases. (See *In re Caswell Construction Co.* (D.C.), 13 Fed. (2d) 667; *United States v. City of Greenville* (5 Cir.), 118 Fed. (2d) 963.) The government does not tell us what it finds in Sections 3670-71-72 of the Internal Revenue Code which gives it priority over inchoate liens which antedate its own liens. We are aware of but one case involving the question of relative priority between a government lien arising under Section 3670 of the Internal Revenue Code and an inchoate lien. In that case (*In re Van Winkle*, 49 Fed. Supp. 711), the Court held that the equitable lien of a surety could be related back to defeat the government's lien. The government did not appeal.

CONCLUSION.

The United States Supreme Court has repeatedly recognized the validity and propriety of inchoate liens. (See *Detroit Bank v. United States*, supra; *United States v. Alabama*, 313 U. S. 274.) It is submitted that there is nothing in the Bankruptcy Act or in any other act of Congress which grants liens of the United States priority over earlier inchoate liens.

Dated, San Francisco, California,

April 27, 1945.

Respectfully submitted,

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(Appendix Follows.)

Appendix.



Appendix

Internal Revenue Code, [as amended by Sec. 521 (a) (20) of the Revenue Act of 1941, c. 412, 55 Stat. 687]:

SEC. 3412. TAX ON GASOLINE.

(a) There shall be imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of $1\frac{1}{2}$ cents a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

* * * * *

(26 U. S. C. 1940 ed., Sec. 3412.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1940 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the

liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1940 ed., Sec. 3671.)

SEC. 3672. [as amended by Sec. 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862]. VALIDITY AGAINST MORTGAGEES, PLEDGEEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

(26 U. S. C. 1940 ed., Sec. 3672.)

Deering, California General Laws (1939 Supp.):
Act 8488. Bank and Corporation Franchise Tax Act:

SEC. 29. *Lien of tax: Inception and duration: Release of lien: Prerequisites to dissolution of taxpayer.*

(a) The taxes imposed by this act shall constitute a lien upon the real property of the taxpayer, which lien shall have the same force, effect and priority as a judgment lien and shall attach on the first day of the “taxable year,” * * *.

* * * * *

Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840:

SEC. 64. *Debts Which Have Priority.* a. The debts to have priority, in advance of the payment of divi-

dends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * *

(4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof:

* * *

* * * * *

(11 U. S. C. 1940 ed., Sec. 104.)

SEC. 67. *Liens and Fraudulent Transfers.*

* * * * *

b. The provisions of section 60 of this act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

* * * * *

(11 U. S. C. 1940 ed., Sec. 107.)

No. 10,932

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of El Camino Refining Company, STATE OF CALIFORNIA and UNIVERSAL CONSOLIDATED OIL COMPANY,

Appellees.

BRIEF FOR UNIVERSAL CONSOLIDATED OIL COMPANY.

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Appellees.

BRIEF FOR UNIVERSAL CONSOLIDATED OIL COMPANY.

Questions Presented.

Insofar as appellee Universal Consolidated Oil Company, hereinafter throughout this brief referred to as "Oil Company," is concerned, but two questions are here presented and raised by the United States in its brief:

1. Whether the District Court erred in allowing interest to the Universal Consolidated Oil Company on the principal sum due under its mortgage, subsequent to the date of adjudication in bankruptcy, or sale, with the mortgagee's consent, of the mortgaged property free and clear of all liens.

2. Whether the District Court erred in subordinating the tax liens of the United States to the payment of attorney's fees and interest on the principal sum due under the mortgage to the Universal Consolidated Oil Company subsequent to the date of adjudication in bankruptcy.

Statutes Involved.

Bankruptcy Act of 1898, c. 541, sec. 67, 30 Stat. 564, as amended by the Act of June 22, 1938, c. 575, sec. 1, 52 Stat. 875, as amended Aug. 22, 1940, c. 686, Title I, sec. 29 (a), 54 Stat. 835, (Title 11, U. S. C. A., sec. 107); Also R. S., sec. 3186, as amended, 26 U. S. C. A., secs. 1560, 1561, 1562.

Statement.

The facts are substantially stated in appellant's brief.

Summary of Argument.

The points raised on appeal by the government in its brief, and considered here, were not raised in the court below; and it is submitted that the government should properly be precluded from raising these questions for the first time upon appeal.

The government concedes the priority of appellee oil company's lien, and also concedes in effect that the composition of the lien as it exists under the law of California will be recognized as a valid lien in bankruptcy; that the general rule that interest stops running upon both secured and unsecured claims after a debtor has passed into bankruptcy is limited by the exception in favor of the secured creditor whose security is sufficient to pay his claim for interest as well as principal.

But the government contends that the exception is itself circumscribed by a purported rule that where property is subject to two liens interest will not run on the superior to the detriment of the principal of the second. However, this last rule, contended for by the government, finds no support in the authorities cited.

The government also contends that the appellee oil company, as mortgagee, is not entitled to subordinate the tax lien of the United States to a greater sum than existed on the date the government lien attached because at that moment the property had in a sense two owners, the mortgagee to the extent of its debt and the United States to the extent of its lien. This theory finds no support in the authorities and is wholly inapplicable to the facts of this case. The contention of the government that though its tax lien may be subordinate to a prior existing mortgage the lien cannot be displaced by increasing the amount of the prior incumbrance by the accrual of interest, is likewise not supported by the cited authorities and the applicable law holds to the contrary.

The argument of the government in support of its contentions embodies an attempt to segregate the mortgage interest from the mortgage debt and to consider it as a separate and distinct lien. This is contrary to the terms of the note and mortgage in question and is in effect contrary to the provisions and to the intent and purpose of the Bankruptcy Act, in as much as it is the purpose of that act to leave valid liens unaffected by proceedings in bankruptcy;—and to set a time, before payment of a secured debt, beyond which time interest would no longer be allowed, would be to affect the lien by the bankruptcy proceedings. The true rule regarding the rights of a secured

creditor of a bankrupt is that such creditor may enforce his lien against his security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied, and a lien-holder may look to his lien not only for the principal but also for the interest accruing up to the date of payment, though his debtor has gone into bankruptcy.

The attorney's fee allowed below was a part of the secured debt, according to the provisions of the mortgage; and the argument hereinabove applied to the question of interest applies with equal force to the question of the attorney's fee. This allowance was consistent with the provisions of the mortgage and with the applicable law.

I.

The Questions Here Considered Are Raised for the First Time Upon This Appeal; and the Government Should Properly Be Precluded From Presenting Such Questions at This Time.

No objection was made by the government in the court below to the allowance of interest upon the mortgage debt as so allowed by that court; and upon the hearing of the application for allowance of attorney's fees no objection was made thereto. [R. 67.] And at no time during the proceedings below was objection made to such allowance.

"It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court, 3 *C. J.* 689, sec. 580, *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234; *Rodriguez v. Vivoni*, 201 U. S. 371, 26 S. Ct. 475, 50 L. Ed. 792; *Huse v. U. S.*, 222 U. S. 496, 32 S. Ct.

119, 56 L. Ed. 285, and where a party has an opportunity to make an objection to a ruling adverse to him and does not do so, he cannot urge the objection on appeal. *Wood v. Wilbert*, 226 U. S. 384, 33 S. Ct. 125, 57 L. Ed. 264."

Ex Parte Keizo Kamiyama, (C. C. A. 9), 44 F. (2d) 503, at p. 505.

Also see: *Van Huffel v. Harkelrode*, 284 U. S. 225, 76 L. Ed. 256; *Diller v. Shocmaker*, (C. C. A. 9), 90 F. (2d) 98, 34 Am. B. R. (N. S.) 163; and 4 C. J. S. 495, Appeal and Error, sec. 244, and cases cited in note 90 thereof.

It is submitted that the contention here made by the government that interest and attorneys fees should not have been allowed as ordered below cannot be raised for the first time upon appeal. *Cook-O'Brien Const. Co. v. Crawford* (C. C. A. 9), 26 F. (2d) 574, cert. denied 49 S. Ct. 29, 278 U. S. 630, 73 L. Ed. 548; *Commercial Travelers Ass'n. v. Sanders*, (C. C. A. 1), 108 F. (2d) 643; *Smith v. Boise City, Idaho*, (C. C. A. 9), 104 F. (2d) 933 at 937; *Metropolitan Life Ins. Co. v. Armstrong*, (C. C. A. 8), 85 F. (2d) 187, at 195; *Inhabitants of City of Plainfield v. Palmer*, (C. C. A. 3), 72 F. (2d) 312; *American Surety Co. of N. Y. v. Savannah Creosoting Co.*, (C. C. A. 5), 35 F. (2d) 272; *Reliance Life Ins. Co. v. Swanson*, (C. C. A. 9), 11 F. (2d) 709. The general rule above set forth has been variously applied to questions relating to the relief granted in suits of an equitable nature, as where proper objection has not been made below regarding an award of priority to liens (See: 4 C. J. S. 640, Appeal and Error, sec. 312, note 13), or in the scope or extent to which a lien has been declared or enforced (*idem.*, note 14). "As a general rule objections to

the mode and conduct of a hearing before or the findings or decision of a referee, master, commissioner, or auditor cannot be urged for the first time on appeal." 4 C. J. S. 636, Appeal and Error, sec. 311.

The fact that the United States Government is the appellant here furnishes no exception to the rule regarding questions raised for the first time on appeal. The general rules as to trial apply in actions in which the United States is a party, *Green v. U. S.*, 9 Wall. (U. S.) 655, 19 L. Ed. 806; and as regards appeals, the United States ordinarily stands upon the same plane as other parties. 65 C. J. 1430, United States, sec. 209.

II.

It Was Not Error to Allow Interest to the Mortgagee Subsequent to the Date of Adjudication in Bankruptcy or Sale of the Mortgaged Property, With Its Consent, and to Subordinate the Tax Liens of the United States to Such Payments.

It should be noted that the rights of appellee oil company as a secured creditor were not affected by the sale of the property in question, as the parties stipulated that the lien should be transferred to the proceeds of the sale, thereby stipulating to the transfer of all lien rights. There was no saving clause in the transfer, and the position of the secured creditor with respect to the proceeds of the sale was the same as with respect to the original security. See: *People's Homestead Ass'n. v. Bartlett*, 33 F. (2d) 561.

While conceding the composition of the oil company's lien under the terms of the mortgage in question, namely, a lien securing principal, interest and attorneys fees as

provided in the mortgage, and while conceding the superiority of that lien over the tax lien of the government, the government, however, contends for a rule that where property is subject to two liens, interest will not run on the superior to the detriment of the principal of the second, and cites *Lerner Stores Corp. v. Electric Maid Bake Shops*, 24 F. (2d) 780 (C. C. A. 5), as authority therefor, acknowledging at the same time that *Wilson v. Dewey*, 133 F. (2d) 962 (C. C. A. 8), holds a contrary view. It is submitted that the *Lerner Stores* case, *supra*, is in no sense an authority for the contended rule. While it is stated in the *Lerner* case that interest on a mortgage does not run beyond the date of the filing of a petition in bankruptcy, such statement is there based on authority of *Sexton v. Dreyfus*, 219 U. S. 339; 55 L. Ed. 244. But the rule of *Sexton v. Dreyfus*, *supra*, is only applicable where the security is insufficient to pay the debt with interest, and it has been so construed (see: *People's Homestead Ass'n. v. Bartlette*, *supra*.), and the government has conceded this limitation of the rule of *Sexton v. Dreyfus*. Aside from this point, the *Lerner Stores* case, *supra*, merely holds that if there is any surplus remaining after payment of the debt due the first lienholder, the second lienholder has a lien on that surplus and the surplus does not go into the general funds of the estate. Such holding is in effect directly contrary to the contention of the government as to the respective rights of a first and a second lienholder.

In passing, it may be well to point out what was held in *Sexton v. Dreyfus*, *supra*. It was there held that secured creditors of a bankrupt, selling their security after the filing of the petition in bankruptcy, and finding the pro-

ceeds of the sale insufficient to pay the whole amount of their claims, are not entitled to apply such proceeds first to interest accrued since the filing of the petition, then to the principal debt, and then prove for the balance. As pointed out in *People's Homestead Ass'n. v. Bartlette*, *supra*, in *Sexton v. Dreyfus*, *supra*, the secured creditors had exhausted their security, and as to the fund were unsecured creditors.

But, as conceded by the government, the rule is otherwise where the secured creditor has not exhausted his security.

"As the obligations to pay interest is not destroyed by the insolvency and as the rights of the secured creditor in his collateral, contractual or statutory, are likewise unaffected, we are of the opinion that a secured creditor * * * may enforce his lien against his security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied."

Ticonic Natl. Bank v. Sprague, 303 U. S. 406, 82 L. Ed. 926, in which case it is also stated (at pp. 930, 931, 82 L. Ed.):

"The rule as to the date to which interest is to be allowed on secured claims sharing pro rata with unsecured claims, cannot apply to the disposition of pledged or mortgaged assets subject to the lien of individual creditors, unless we are to disregard the rights in these assets acquired prior to insolvency."

Most of the other cases cited by the government either do not sustain its contention or sustain a contrary view.

Michigan v. U. S., 317 U. S. 338, 87 L. Ed. 312, has no application to the facts of the present case, insofar as appellee oil company is concerned. That case involved a controversy over whether certain liens for state taxes has priority over the lien of the government for estate taxes. The state liens accrued subsequent to the federal tax liens, and the court held the federal liens superior. *New York v. Maclay*, 288 U. S. 290; 77 L. Ed. 754, distinguishes the situation there presented with one involving the lien of a mortgage.

In *Wilson v. Dewey*, 133 F. (2d) 962, at page 965, it is stated:

"The rule that no interest accrues on the debts or claims of unsecured creditors after the date of bankruptcy where the bankruptcy estate is insolvent does not apply to the debts or claims of secured creditors."

See: *Coder v. Arts* (C. C. A. 8), 152 F. 943, 950; 15 L. R. A. (N. S.) 372 and *In re Faybacher*, D. C., La., 27 Am. B. R. 534, 193 F. 556. In *People's Homestead Ass'n. v. Barlette*, *supra*, the mortgaged property was sold free of liens at public auction in bankruptcy proceedings for more than enough to satisfy claims for principal and interest up to the date of the completed sale, and the attorney's fee. Appellant had been allowed interest up to the date of auction, but applied for interest up to the date of the completed sale. His right thereto was upheld, as well as his right to attorney fees upon the amount of interest which had been disallowed. But in that case no claim was made for interest beyond the date of the completed sale. See: *San Antonio Loan & Trust Co. v. Booth*, 2 F. (2d) 590, (C. C. A. 5), which holds a mortgagee should be allowed interest, as specified in the mortgage, so far as it

can be satisfied out of the security, up to the time of payment of the entire mortgage. The government cites *In re Stevens*, 173 F. 842, as authority for the contention that at least interest ceases on the sale of the mortgaged property free of liens. That case so holds, but on the following grounds, i.e.: that the sale is in effect the end of the proceedings, and the duty then devolves on the trustee to pay the claimant his debt and the estate ought not to be burdened with the payment of interest subsequent to that time. But the decision in that case does not consider what the situation would be in the event the trustee failed to fulfill his duty in that regard. However, *In re Stevens, supra*, is definite authority for the running of interest on a secured debt after the date of the filing of a petition in bankruptcy. The decision in that regard is based upon the ground that a lien shall not be affected by the bankruptcy act, pursuant to the provisions of section 67d thereof. The court there says (at p. 843):

"A lien in the usual course of business is given to secure interest accruing, as well as the principal of a demand, and it needs no argument to demonstrate the fact that, if the act should declare that interest shall cease upon secured demands at a given date, whether the demands are paid or not, it would affect the lien constituting such security."

It might be pointed out that the court *In re Stevens*, in holding that interest did not run beyond the date of sale of the mortgaged property, reached a decision directly contrary to the reasoning given in the decision for the continuation of interest on a secured lien. In *San Antonio Loan & Trust Co. v. Booth, supra*, the running of interest to the time of payment of the debt was clearly upheld, on

the ground that the bankruptcy act (sec. 67d) provided that liens given or accepted in good faith should not be affected by bankruptcy, citing *Coder v. Arts, supra*. In *Phoenix Bldg. & Homestead Ass'n. v. E. A. Carrere's Sons*, 33 F. (2d) 563, the trial court allowed appellant principal and interest upon its mortgage to date of payment and such allowance was not contested upon appeal. *In re Hershberger*, 208 F. 94, holds that where the property of a bankrupt is sold free of liens, the lien attaches to the fund realized from the sale until actual payment is made, or a decree is made authorizing payment, and that interest is therefore allowed up to that time. The decision in that case quotes Judge Orr, *In re Torchia* (D. C.), 185 Fed. 584:

"Interest is allowable on such a mortgage to the date of payment of the principal. Having been transferred from the land to the fund realized by sale, they must be payable when and only when the fund is distributable; that is, when the referee under the bankruptcy act first prepares a decree or order for distribution."

The government cites *Coder v. Arts*, 213 U. S. 223, aff'g, C. C. A. 8, 152 F. 943, as authority for the statement that when the court with the mortgagee's consent orders a sale free of liens, interest does not run beyond the day the purchaser at the sale has paid the purchase price in full. There is nothing in *Coder v. Arts, supra*, which supports this statement. The only holding in that case relative to interest on the mortgage debt was that the Circuit Court of Appeals did not err in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt. It should be

pointed out that the decision of the Circuit Court in *Coder v. Arts, supra*, stands for the proposition that where a trustee sells mortgaged property of the bankrupt free of the mortgage and the proceeds thereof are sufficient for that purpose, the mortgagee is entitled to the payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage. *In re Gotham Can Co.*, (C. C. A. 2), 48 F. (2d) 540, was a case where a secured creditor claimed service charges on the collection of accounts held as security and for attorneys fees in connection with the collections. These collections were made after adjudication of bankruptcy of the debtor to whom advances were made on the security of accounts receivable assigned to the creditor. The court allowed attorneys fees on authority of *Boise v. Talcott*, 264 F. 61; *In re Rosenblatt*, 299 F. 771. *Security Mortgage Co. v. Powers*, 278 U. S. 149, 73 L. Ed. 236; and also allowed the service charges, holding the same in the nature of interest, distinguishing the rule in *Sexton v. Dreyfus, supra*.

The government advances its theory of there being "two owners" of the property in question, i. e.: the mortgagee, to the extent of its lien, and the government, to the extent of its lien, as a fundamental reason why the mortgagee is not entitled to subordinate the government's tax liens to a greater sum than existed on the date the government's liens attached. For this proposition *United States v. City of Greenville*, 118 F. (2d) 963 (C. C. A. 4), is cited as authority. In that case the reference to property having in a sense two owners was made in connection with a discussion of two types of transactions where real estate taxes are not considered "taxes" within the meaning of

26 U. S. C. A., Int. Rev. Code, sec. 23(c). One such transaction is one involving the purchase of property to which a tax lien has attached. The court stated that "that property has in a sense two owners, the seller, and through the lien, the state. Hence, its full acquisition entails two payments, the nominal purchase price, and the taxes represented by the lien". *U. S. v. City of Greenville, supra*, involves a question as to when taxes may be deducted from gross income under the provisions of the Internal Revenue Code. Consideration of whether a property has in a sense "two owners" in determining whether a payment of taxes on a sale of real property may be deducted as a "payment of taxes," under the Internal Revenue Code, or is to be considered a capital expenditure has no application to the consideration of the relationship of the respective liens of a mortgagee of real property and of the Federal government for taxes. The contention of the government based on the ground of there being "two owners" of the property is wholly without foundation.

It is recognized that the language used in the provisions of Section 67, sub. a(1) of the Bankruptcy Act of 1938, 11 U. S. C. A. sec. 107, sub. a(1) clearly implies that every lien so obtained more than four months before the filing of a petition in bankruptcy shall be valid as against the trustee in bankruptcy. See: *Kaufman v. Eastern Baking Co.*, 53 F. Supp. 364, at 367. A valid lien, therefore, is not destroyed by insolvency and remains unaffected by the provisions of the Bankruptcy Act. *Ticonic Nat'l. Bank v. Sprague, supra*; *San Antonio Loan & Trust Co. v. Booth, supra*; and to stop the running of interest upon a secured debt, where the security is sufficient to pay the debt with interest, would be to affect the lien adversely by

the proceedings in bankruptcy, contrary to the intent and purpose of the Bankruptcy Act.

The government contends that "accrual of interest on the mortgage debt is not within the classes enumerated and protected by the statute" (R. S. sec. 3186, as amended, 26 U. S. C. A., secs. 1560, 1561, 1562). Such classes are (1) mortgagee, (2) purchaser, (3) judgment creditor. The government cites *MacKenzie v. U. S.*, 109 F. (2d) 540, as authority. That was a case in which a creditor who had attached a taxpayer's property contended that he was entitled to be considered a "judgment creditor" within the meaning of the statute. The court held that there was no authority for such a contention. But a mortgagee is expressly entitled to the protection of the provisions of the statute in question, and the interest on the amount due is a part of the mortgage debt, and the unrecorded tax lien is by the statute provided to be not valid as against a mortgagee. The case cited is in no way applicable to the present situation. An attachment is in no sense analogous to the lien of a mortgage for interest due thereunder in view of the express provisions of the statute.

The principal and interest under the obligation secured by the mortgage in question are all part of the mortgage debt secured by the lien thereunder. There need be no doctrine of "relation back" to bring after accrued interest under the lien of the mortgage. In this connection, see *Security Mortgage Co. v. Powers*, 278 U. S. 149, 73 L. Ed. 236. The amounts secured by the lien of the mortgage may not be segregated. If the lien of the mortgage is prior to that of the government for taxes, and the security is sufficient to pay the amount due, the mortgagee is entitled to satisfaction of the debt due him prior to payment

of the amount due the government for taxes. The whole is equal to the sum of its parts, and the mortgage lien, and all sums thereby secured must be treated as an entirety.

It should be pointed out that the government makes no contention that the security, namely, the proceeds from the sale of the property, is insufficient to pay the mortgage debt.

The total estate was \$21,243.30. The oil refinery plant was sold for \$19,927.85, of which \$273.00 was personalty. In other words, the mortgage covered \$19,654.83. [Transcript of the Record page 64.] The expense of administration, including payment of various current taxes, etc., amounted to \$6929.83. [Transcript of the Record page 74.] It is obvious from these figures and the record that there was and is more than sufficient property subject to the lien of Universal Consolidated Oil Company's mortgage, to pay the balance of principal due Universal Consolidated Oil Company, the interest thereon and the attorney's fees, i.e., \$11,234.78, as of January 15th, 1944.

The Government did not raise the question of interest at the time of the transfer of the lien, it alone raised the question of what was personalty and what was real property covered by the mortgage, thus causing several days of hearing before the Referee, i.e., it attacked the mortgage. It alone attacked the findings of the Referee. It alone objected to the order of the Circuit Court upholding the Referee. The necessary conclusion is that it alone has caused the delay, so far as Universal Consolidated Oil Company's payment is concerned, and so any interest which has accrued, or is accruing as the result of the position of the Government, should equitably be borne by it.

It may well again be emphasized in this summary that the transfer of the lien was the subject of stipulation without reservation as to interest or Attorney's fees. There was no objection on the part of the Government to the granting of Universal Consolidated Oil Company's petition for attorney's fees, and the points concerning interest and attorney's fees were not raised by the Government until after the decision of the District Court.

III.

The Tax Liens of the United States Were Not Entitled to Be Satisfied Ahead of the Attorney's Fees Awarded to the Mortgagee.

Security Mortgage Co. v. Powers, supra, is conclusive authority for the proposition that the attorney's fees were part of the debt secured by the mortgage and are collectible as such. In that case property of a bankrupt was subject to the lien of a mortgage debt. The trustee applied for leave to sell the property free of the lien. Leave to sell was granted, preserving to the lien creditor its right in the proceeds of the sale. The secured indebtedness was represented by a principal note and ten coupons, providing for payment with interest with all costs of collection, including attorneys fees (to the extent of 10%). So far as appears the lien holder did not employ an attorney until after it had been served with an order to show cause on the trustee's application for leave to sell the property. There had been no default before adjudication. The court held the attorney's fees part of the mortgage debt notwith-

standing that they accrued after adjudication. The court states:

“The contingent obligation to pay attorney’s fees was a part of the original transaction.”

The Government here makes no contention that attorney’s fees as provided in the note and mortgage were not made a part of the debt, or would not be secured by the same lien. The only argument the Government advances against the allowance of the fees in question is that once the Government’s lien attached, it was subordinated only to the amount then due on the mortgage and this sum could not be opened up and increased by attorney’s fees for services to be performed in the future by any doctrine of “relation back.” As already pointed out under Point II hereof, there is no need to employ any doctrine of “relation back” to support the lien for attorney’s fees; and what has already been said under Point II regarding the allowance of interest is also true of the question of the allowance of attorney’s fees. The cases heretofore cited in support of the mortgagee’s right to interest are equal authority in support of its right to the fees in question, and are referred to herein in that connection. See in particular: *People’s Homestead Ass’n. v. Bartlette supra*, *In re Gotham Can Co., supra*, While it is true that liability for a fee depends upon the rendition of legal services, where such services have necessarily been rendered, (and here the rendition was compelled by the Government i.e., the party objecting after causing the services), there is no question that the fee is properly allowed, provision having been made therefor under the obligation.

Conclusion.

For the reasons stated the order of the District Court affirming the order of the Referee is correct (so far as Universal Consolidated Oil Company is concerned) and should be affirmed. The United States Circuit Court of Appeal, for the Ninth Circuit, is hereby respectfully requested to make its order accordingly.

C. E. McDOWELL,
McINTYRE FARIES,
ALLAN M. CARSON,

*Attorneys for Universal Consolidated Oil Company,
Appellee.*

No. 10,932

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bank-
ruptcy of the Estate of El Camino Re-
fining Company, STATE OF CALIFORNIA
and UNIVERSAL CONSOLIDATED OIL
COMPANY,

Appellees.

Upon Appeal from the District Court of the United States for the
Southern District of California,

BRIEF FOR PAUL W. SAMPSELL, TRUSTEE
IN BANKRUPTCY, APPELLEE.

GRAINGER AND HUNT.

830 H. W. Hellman Building, Los Angeles 13,
Attorneys for Trustee in Bankruptcy.

FILED

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PAUL P. O'BRIEN,
CLERK

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No. 10,932

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of El Camino Refining Company, STATE OF CALIFORNIA and UNIVERSAL CONSOLIDATED OIL COMPANY,

Appellees.

BRIEF FOR PAUL W. SAMPSELL, TRUSTEE IN BANKRUPTCY, APPELLEE.

I.

Preliminary Statement.

The attorney for the trustee in bankruptcy actively participated in the proceedings before the referee in bankruptcy and the District Judge. Since the appeal to the Circuit Court of Appeals really involves a controversy between the United State of America, the State of California, and the Universal Consolidated Oil Company, with the trustee as a sort of a stakeholder, he thought, at first, he should not put the estate to the expense of his counsel preparing a brief. But it appears that the briefs

already filed in the appeal do not fully discuss the points involved as was done before the lower courts, so the trustee feels that he can be of assistance to the Appellate Court and should protect, as far as he can, the decisions of the lower courts by filing a short brief of his own on appeal; and does so with the consent of this court first obtained. The facts have been properly stated in the briefs already filed; likewise as to the questions presented.

II.

Summary of Argument.

1. Bankruptcy law and practice are statutory while equity proceedings are case made. An inchoate statutory lien, under the bankruptcy law, arising prior to bankruptcy, can be perfected after bankruptcy and relate back to the date when it became a lien pursuant to the applicable State or Federal law.

2. In order to sustain the contentions of the Federal Government, it will be necessary for the Appellate Court to overrule its previous decision in the case of *In re Knox-Powell-Stockton Co.*

3. Section 70c of the Bankruptcy Act places the State tax lien and the mortgage debt lien ahead of the Federal tax lien.

III.
ARGUMENT.

(1) Inchoate Statutory Liens, in Bankruptcy, May Be Perfected After the Date of Bankruptcy and Become Valid as of the Date They Attach Under Applicable State and Federal Law.

Section 67b provides, in effect, that, where by State or Federal law, statutory liens for taxes arise, but are not perfected before bankruptcy, they may be perfected thereafter and be valid as against the estate. The tax liens asserted by the State of California here, although inchoate as to amount, became fixed and attached to the real property of the debtor on January 1, 1939, and January 1, 1940, both these dates being prior to the time that the Federal tax liens attached to such property. See California Bank and Corporation Franchise Tax Act, Act 8488, Deering California General Laws (1939 Supplement), Sections 25 and 29.

The California courts have held that, with respect to ordinary taxes, liens attach on the first Monday in March of each year, notwithstanding the taxes are not fixed or payable until the assessment has been thereafter made, it being said that the subsequent assessment does not create the lien, but is merely one of the steps for its enforcement. *County of San Diego v. County of Riverside* (1899), 125 Cal. 495, 58 Pac. 81; *City of Santa Monica v. Los Angeles County* (1911), 15 Cal. App. 710, 115 Pac. 945; see cases collected, 24 *Cal. Jur.*, Taxation, Sec. 208, pp. 218, 219.

(2) It Will Be Necessary for This Court to Overrule Its Previous Decision in the Case of Knox-Powell-Stockton Co. If it Sustains the Federal Government's Contentions in This Case.

In the case of *In re Knox-Powell-Stockton Co.*, C. C. A. 9, 100 F. (2d) 979, 38 Am. B. R. (N. S.) 766, reference is made to the cases of *Spokane County v. United States*, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621, and *New York v. Maclay*, 288 U. S. 290, 53 S. Ct. 323, 77 L. Ed. 754, which cases are heavily relied upon by the Federal Government in its contentions here. This court stated: "All of these cases arose under Section 3466 of the Revised Statutes, 31 U. S. C. A., Section 191, which grants priority to the United States over all other creditors when the debtor is insolvent. The cited cases establish that under this section an inchoate lien will not defeat the priority established by said section. But this being a bankruptcy proceeding, the provisions with respect to priority under Section 3466 of the Revised Statutes do not apply here. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 160, 27 Am. B. R. 873, 32 S. Ct. 457, 56 L. Ed. 706; *Davis v. Pringle*, 268 U. S. 315, 5 Am. B. R. (N. S.) 969, 45 S. Ct. 549, 69 L. Ed. 974; *Claude D. Reese, Inc. v. United States*, C. C. A. 5 (1935), 27 Am. B. R. (N. S.) 334, 75 F. (2d) 9. And in construing Section 67d of the Bankruptcy Act our inquiry as to what constitutes a lien thereunder is not embarrassed by the auxiliary consideration as to whether the lien of a tax not presently enforceable is sufficient to avail against a statutory preference which is to be literally construed in favor of the United States. *Spokane County v. United States*, 279 U. S. 80, 92, 93, 49 S. Ct. 321, 73 L. Ed. 621, quoting *Price v. United States*, 269 U. S. 492, 499, 46 S. Ct. 180, 70 L. Ed. 373.

These views are supported by the new Section 67b which became a part of the Bankruptcy Act by virtue of the Chandler Amendatory Act of 1938.

It seems strange that the case of *United States v. Reese*, C. C. A. 7, 51 Am. B. R. (N. S.) 660, 135 F. (2d) 466, a bankruptcy case heavily relied upon by the Federal Government, makes no reference at all to the decision of our court here in the *Knox-Powell-Stockton Co.* case. In the *Reese* case the Seventh Circuit relies upon Section 3466 of the Revised Statutes which our court here in the *Knox-Powell-Stockton Co.* case flatly states does not apply to bankruptcy proceedings; and, also, relies heavily upon the case of *New York v. Maclay*, 288 U. S. 290, 77 L. Ed. 754, which is discussed by our court here in the *Knox-Powell-Stockton Co.* case. The decision in the case of *United States v. Texas*, 314 U. S. 480, 62 S. Ct. 350, 86 L. Ed. 356, was decided after the decision in the *Knox-Powell-Stockton Co.* case. The case of *In re Van Winkle*, DC, Ky., 49 F. Supp. 711, 53 Am. B. R. (N. S.) 296, is illuminative upon this subject.

The California Franchise Tax Act does not require these liens to be perfected after they accrue. Like the real estate taxes and the Oil and Gas Supervisor's taxes considered by the Circuit Court of Appeals for this Circuit in *In re Knox-Powell-Stockton Co.*, it is immaterial when the reduced amount of the taxes was determined in our case here, for the liens for such taxes attached upon the date specified in the statutes. Under the laws of California the lien is an immediate liability created by statute, and the levy and assessment are but a step necessary for the enforcement of the already existing lien, *i. e.*, a lien declared by a positive statute is not dependent for its existence upon subsequent acts requisite to its enforce-

ment. (See *County of San Diego v. County of Riverside*, 125 Cal. 495, 500; *Couts v. Cornell*, 147 Cal. 560, 564; *City of Santa Monica v. Los Angeles County*, 15 Cal. App. 710, 712; *National Holding Company v. Title Insurance & Trust Company*, 45 Cal. App. (2d) 215, 224.) The Federal Government quotes from the case of *State of Michigan v. United States*, 63 S. Ct. 302. Said case is not in point for the additional reason that the local taxes there involved *accrued* subsequent to the Federal Estate Tax lien there under consideration.

There is nothing new or strange in the proposition that statutory liens need not be perfected. In the case of *Detroit Bank v. United States* (1943), 63 S. Ct. 297, 298 (a companion case to the *Michigan* case, *supra*) it is pointed out that under Section 315(a) of the Revenue Act of 1926, the lien of the Federal Estate Tax attached at the date of the decedent's death without the necessity for an assessment, demand for payment, recordation of said lien, or any other procedure in order to perfect it as against subsequent liens.

(3) Applicability of Section 70c of the Bankruptcy Act in Connection With These Federal Tax Liens.

The claims of these Federal tax liens were not recorded in the office of the County Recorder of Orange County, California, where the property is located, or filed with the clerk of the district court within whose jurisdiction the property is situated. The liens arose, under the Federal Statute, by the filing of the assessments with the Collector of Internal Revenue at Los Angeles, which is about as obscure and inaccessible a place as could be selected to give reasonable notice to the public.

How far does Section 70c of the Act affect these Federal tax liens, whether perfected before or afterwards? That section provides that the trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor exists. This is the status of all the property in our estate here.

The Federal Statutes themselves, Sections 3670, 3671 and 3672 of the *U. S. Internal Revenue Code*, state that the liens created thereunder, and here asserted, are inferior to the rights of a previous judgment creditor. The language of Section 70c of the Bankruptcy Act would surely include a judgment creditor, as well as any other kind of creditor. If that is so, then we are inclined to believe to be correct the view taken by the late Horace H. Glenn, Referee in Bankruptcy at Minneapolis and St. Paul, of the U. S. District Court of Minnesota, in his recent decision in the unreported case of *The Stenson Company*, No. 15, 591 in Bankruptcy. His decision was not appealed from by the Federal Government. In his decision, the referee stated:

“Section 70c of the Bankruptcy Act gives the trustee all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, as to all property in the possession of or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court: and as to all other property the rights, remedies and powers of a judgment creditor holding an execution returned unsatisfied. Under Section

3672, Title 26, U. S. C. A. the lien is not valid as against a mortgagee, pledgee, purchaser or judgment creditor unless it has been filed as provided by state law. Minnesota has such a law, and no notice was filed. If Section 70c had read 'a judgment creditor holding a lien' instead of 'a creditor holding a lien by legal or equitable proceedings,' there could be no question. Of course a creditor holding a lien by legal or equitable proceedings is commonly a judgment creditor, although he need not necessarily be such. How are we to construe the words 'judgment creditor' in the phrase 'mortgagee, pledgee, purchaser or judgment creditor' in Section 3672? 'Mortgagee,' 'pledgee,' and 'purchaser' clearly refer to three classes of persons who have acquired a lien or an ownership interest in the property, but they do not include one who may have acquired such an interest through a judgment. I think it is a sensible construction to interpret this reference to a judgment creditor to mean a judgment creditor who has acquired an interest in the property, that is, a judgment lien creditor. It is this class of persons which it is obviously intended to protect by this provision. Why protect a judgment creditor without a lien any more than a contract creditor without a lien? When the words 'judgment creditor' were used instead of merely the word 'creditor' in this clause, it would seem reasonable to suppose that what was intended was a creditor who had by judgment acquired an interest in the property. I think this construction is valid, and that the trustee by virtue of his office has, under Section 70c, superior rights to the claimant, because of the failure to file the lien, if the lien was valid in any event. Another argument supporting this view is that 70c was intended to be wholly comprehensive as to the rights of the trustee. As to property *not* in the possession of or under the control

of the bankruptcy court he is given the rights of a judgment creditor, and it surely was not intended that his rights in property in possession should be any less, but rather that they should be more comprehensive.

Has the claimed lien any force in any event, in the absence of some seizure, segregation or designation of specific property? Section 3466 of the Revised Statutes, which is Section 191 of Title 31 U. S. C. A., reads as follows:

‘Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debt due from the deceased, the debts due to the United States shall be first satisfied.’

This provision dates back to 1797 and has been frequently construed. It is well-settled that it creates no lien and that its provisions are qualified by the Bankruptcy Act and are subject thereto. The lien provisions of Section 3670, Title 26 U. S. C. A., appear to date back to 1866. The United States apparently set the example for such blanket, inchoate lien legislation. Of course it was common for property taxes to be made a lien on the property taxed, but to make excise taxes, income taxes, and the like a lien against everything owned by the taxpayer is another matter. Many states enacted similar laws, seeking to give their taxes a lien status, and conflict has frequently occurred between Section 3466 R. S. and these state laws. The last Supreme Court decision in these cases is *United States v. Texas*, 62 S. Ct. 350, 48 Am. B. R. (N. S.) 514, and it follows numerous earlier decisions to the effect that these state statutes providing for a general, inchoate lien cannot prevail against the priority afforded the United States by Section 3466, and this notwith-

standing some of these statutes create a more specific lien than does Section 3670 relied on here, notably the Texas' statute involved in the case last cited. The basis of these decisions is that these statutory liens, unaccompanied by any seizure or segregation of property, are inchoate and unperfected, serving 'merely as a caveat of a more perfect lien to come.' This is the medicine which the United States Supreme Court administers to the States, and I think the United States must take its own medicine when its inchoate, unperfected lien is brought in question.

The United States has all the protection possible if it will only follow its own procedure. It can proceed to make specific and enforce its lien the very day that lien attaches under the statute; it can at any time distrain any property of the taxpayer; if there is a bankruptcy it has a priority over everything except administration expenses and priority wages; if there is a general assignment or other liquidation outside of bankruptcy its debt is to be first satisfied under Section 3466; and if the taxpayer dies it has a similar priority in the probate proceeding. With all this comprehensive protection, it would seem to be little enough to require that the government follow its own prescribed procedure when it seeks to rely on its lien claim. If it does so, the property is segregated and is not left ostensibly free of liens for innocent persons to deal with. In these days everybody owes the Federal Government, or soon will, and if the claim made here by the United States is valid it will soon have a lien on practically all of the privately owned property in the country. It would be intolerable if in every ordinary commercial transaction account would have to be taken of this lien right."

It would seem to follow in our case, therefore, that the Federal tax liens here asserted, since they were never re-

corded in Orange County, or filed in the office of the Clerk of our District Court at Los Angeles, are invalid as against the trustee in bankruptcy, and can only be treated as claims of a creditor entitled only to priority of payment under Section 64a(4) of the Act. The condition of our estate here is such that it will be consumed by lien claims and expenses of administration, and there will be nothing left for priority and general creditors.

While the trustee's primary duty is to the general creditors (*In re San Joaquin Valley Packing Co.*, C. C. A. 9, 295 F. 311, 4 Am. B. R. (N. S.) 37), the trustee is trustee for all creditors. (*In re Scott*, D. C., Mich., 53 F. (2d) 89, 19 Am. B. R. (N. S.) 85, and *In re Lewensohn*, C. C. A. 3, 121 F. 538, 9 Am. B. R. 368.) So, therefore, it would seem that his status would protect the State and the mortgagee here as against Federal tax liens.

IV.

Conclusion.

By reason of the foregoing and the contentions made by the State of California and the Universal Consolidated Oil Company in their respective briefs and by a careful consideration of the Federal Government's contentions in their brief, the trustee is of the opinion that the decisions of the courts below are correct and should be affirmed on appeal.

Dated this 23rd day of May, 1945.

Respectfully submitted,

GRAINGER AND HUNT.

By REUBEN G. HUNT,

Attorneys for Trustee in Bankruptcy.

No. 10933

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the
Last Will and Testament of Nat Rogan, Deceased,
Appellant,

vs.

FERNAND MERTENS, also known as FERNAND
GRAVET and VICTORINE CATHERINE RE-
NOURD MERTENS,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAR 21 1945

PAUL P. O'BRIEN,
CLERK

No. 10933

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the
Last Will and Testament of Nat Rogan, Deceased,

Appellant,

vs.

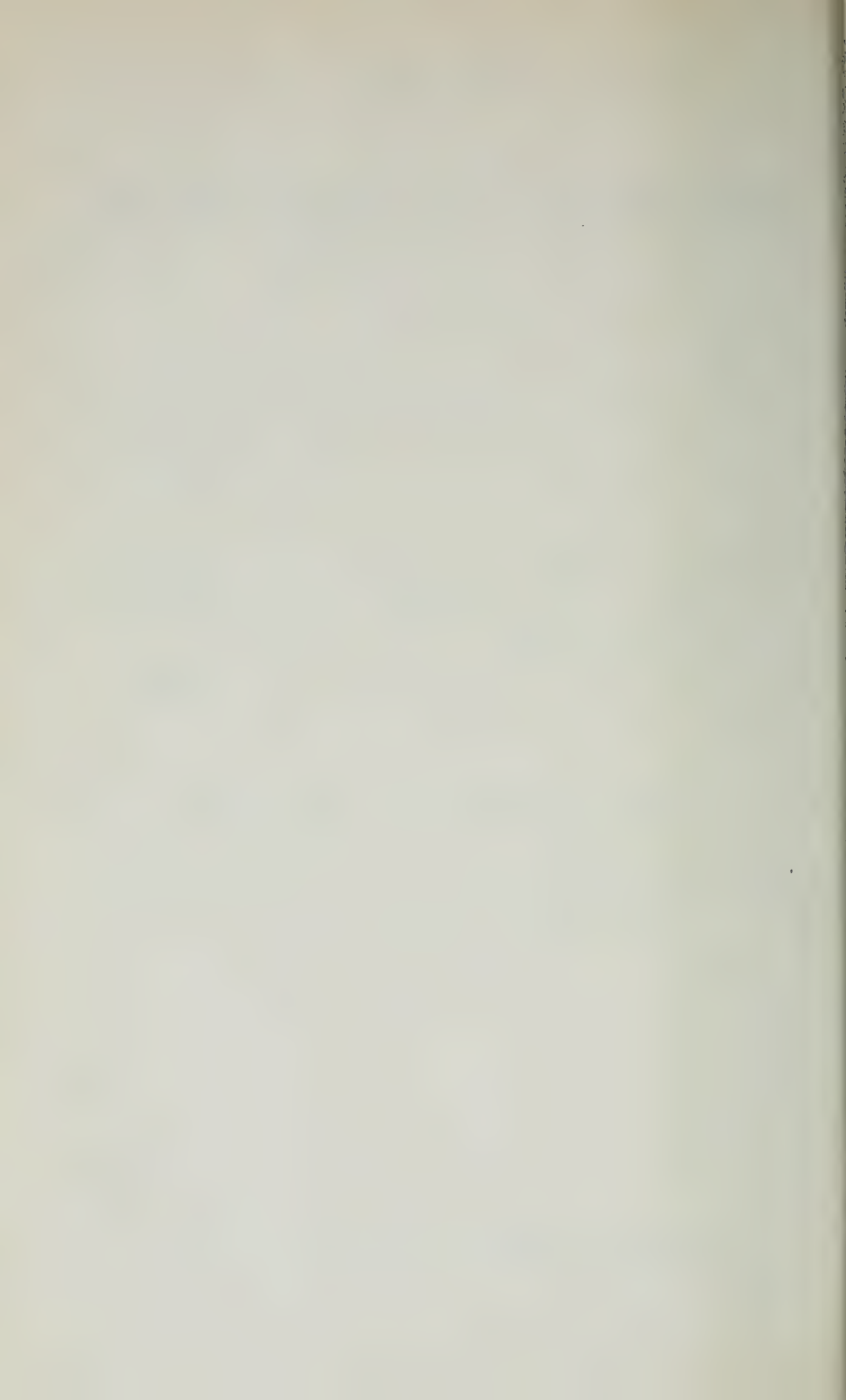
FERNAND MERTENS, also known as FERNAND
GRAVET and VICTORINE CATHERINE RE-
NOURD MERTENS,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles, California

For Appellee:

LOEB AND LOEB

GEORGE H. ZEUTZIUS,

HERMAN D. GREENSCHLAG

523 West Sixth Street

Los Angeles, California [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 3002-Y Civ.

FERNAND MERTENS, also known as FERNAND
GRAVET, and VICTORINE CATHERINE RE-
NOURD MERTENS,

Plaintiffs,

vs.

ETHEL STRICKLAND ROGAN, as Executrix of the
Last Will and Testament of Nat Rogan, Deceased,
Defendant

AMENDED COMPLAINT

(For Refund of Income Tax)

Plaintiffs complain of the above named defendant, as executrix of the Last Will and Testament of Nat Rogan, deceased, and alleges as follows:

I.

On or about August 8, 1943, Nat Rogan died testate, and thereafter, on or about October 8, 1943, by an order duly made and entered in the Superior Court of the State of California in and for the County of San Diego, Ethel Strickland Rogan was appointed executrix of the Last Will and Testament of said Nat Rogan, deceased, and thereafter, on or about October 8, 1943, she duly qualified as such executrix and letters testamentary were thereupon duly issued to her out of said Court, and she has ever since been [2] and now is the duly appointed, qualified and acting executrix of the Last Will and Testament of said Nat Rogan, deceased.

II.

During the year 1938 and at all times subsequent thereto up to June 30, 1943, and at the date of the filing of the Complaint herein, said Nat Rogan was the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth Collection District, California.

III.

Plaintiffs are and at all times herein mentioned were husband and wife, plaintiff Fernand Mertens, also known as Fernand Gravet, is now and at all times herein mentioned was, a citizen of the Kingdom of Belgium; plaintiff Victorine Catherine Renourd Mertens is now and at all times herein mentioned was, a citizen of the Republic of France; plaintiffs were at all times herein mentioned during the year 1938 residents of the County of Los Angeles, in the Southern District of California, Central Division; plaintiffs are now residents of Paris, France.

IV.

During the year 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, rendered services as an actor for Warner Bros. Pictures, Inc. in said County of Los Angeles, in the Southern District of California, Central Division, and said Warner Bros. Pictures, Inc., during said year 1938, paid to or for the benefit of said Fernand Mertens, also known as Fernand Gravet, for said services the sum of \$10,204.09.

V.

During the year 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, rendered services as an actor for Loew's Incorporated, pursuant to the terms of the written contract [3] dated July 29, 1938, and in accordance with the terms of said contract Loew's Incorporated, during said year 1938, paid to or for the benefit of said

Fernand Mertens, also known as Fernand Gravet, for said services the sum of \$121,242.30.

VI.

All of the moneys paid to or for the benefit of plaintiff Fernand Mertens, also known as Fernand Gravet, as in paragraphs IV and V above set forth, was community income of plaintiffs herein.

VII.

Said contract of July 29, 1938 further provided that said Loew's Incorporated agreed to pay all taxes which might lawfully be assessed against plaintiff Fernand Mertens, also known as Fernand Gravet, in the United States to the extent that such taxes were based upon sums derived by plaintiff Fernand Mertens, also known as Fernand Gravet, from his services performed under said contract.

VIII.

In June 1938 plaintiff Victorine Catherine Renourd Mertens desired to depart from the United States of America and it became necessary, under the provisions of the Revenue Act of 1938, for her to obtain a certificate of compliance from said Nat Rogan as Collector of Internal Revenue as aforesaid; before issuing said certificate said Nat Rogan, as Collector of Internal Revenue as aforesaid, computed a tentative federal income tax liability in respect to plaintiff Victorine Catherine Renourd Mertens for one-half of the community income of plaintiffs earned up to May 31, 1938; that said Nat Rogan, as Collector of Internal Revenue as aforesaid, estimated

said tentative liability to be \$3,249.92 and before issuing said certificate of compliance demanded payment of said sum, which sum plaintiff Victorine Catherine [4] Renourd Mertens paid to him on the 21st day of June, 1938.

IX.

In September 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, desired to depart from the United States of America, and it became necessary, under the provisions of the Revenue Act of 1938, for him to obtain a certificate of compliance from said Nat Rogan, as Collector of Internal Revenue as aforesaid.

X.

On September 6, 1938, said Nat Rogan, as Collector of Internal Revenue as aforesaid, recomputed the tentative federal income tax liability of plaintiff Victorine Catherine Renourd Mertens in respect to one-half of the community income of plaintiffs earned prior to September 1, 1938 and estimated said liability to be \$20,669.80.

XI.

On September 6, 1938, said Nat Rogan, as Collector of Internal Revenue as aforesaid, computed the tentative federal income tax liability of plaintiff Fernand Mertens, also known as Fernand Gravet, in respect to one-half of the community income of plaintiffs earned prior to September 1, 1938, and estimated said liability to be \$20,669.80.

XII.

On September 6, 1938, the Commissioner of Internal Revenue gave notice to each of the plaintiffs of the ter-

mination of their respective taxable periods as of September 1, 1938 and demanded of each payment of the tax claimed due from each for said taxable periods.

XIII.

Before issuing a certificate of compliance to plaintiff Fernand Mertens, also known as Fernand Gravet, and in [5] September 1938, said Nat Rogan, as Collector of Internal Revenue as aforesaid, demanded of him the payment of the sum of \$37,073.27; that said sum was the balance of the tentative liability of plaintiff Victorine Catherine Renourd Mertens after payment to said Nat Rogan, as Collector of Internal Revenue as aforesaid, of the sum of \$3,249.92 on June 21, 1938, as in paragraph VIII set forth, plus the balance of the tentative liability of plaintiff Fernand Mertens, also known as Fernand Gravet, after the withholding and payment to said Nat Rogan, as Collector of Internal Revenue as aforesaid, by said Warner Bros. Pictures, Inc. of the sum of \$1,020.41; that in compliance with said demand, plaintiffs paid to said Nat Rogan, as Collector of Internal Revenue as aforesaid, said sum of \$37,073.27 on the 7th day of September, 1938.

XIV.

In computing the tentative tax liability of each plaintiff herein, said Nat Rogan, as Collector of Internal Revenue as aforesaid, wrongfully included in their community income the sum of \$40,017.41 upon the ground that said sum had been constructively received by plaintiffs from Loew's Incorporated in the year 1938; that

this amount represented the estimate of said Nat Rogan, as Collector of Internal Revenue as aforesaid, of the amount payable by said Loew's Incorporated to plaintiffs as reimbursement for federal income taxes under the provisions of said contract mentioned in paragraph VII.

XV.

In order to obtain funds to pay the various demands of said Nat Rogan, as Collector of Internal Revenue as aforesaid, plaintiffs borrowed from Loew's Incorporated the sum of \$3,245.92 on June 21, 1938, and the further sum of \$37,073.27 on September 7, 1938; that said amounts represented loans and were [6] not payments under the provisions of said contract dated July 29, 1938; that by the provisions of said contract the liability of Loew's Incorporated referred to in paragraph VII hereof, did not mature or become payable until after the end of the year 1938, at which time plaintiffs' tax liability for the year 1938 first became determinable.

XVI.

In the year 1939 plaintiffs filed with said Nat Rogan, as Collector of Internal Revenue as aforesaid, separate federal income tax returns for the year 1938; that for the year 1938 plaintiff Fernand Mertens, also known as Fernand Gravet, had a gross taxable income of \$57,574.70 and a net taxable income of \$56,867.59 and said plaintiff included said amounts in his said return; that for the year 1938 plaintiff Victorine Catherine Renourd Mertens had a gross taxable income of \$57,574.70 and a net taxable income of \$56,867.59 and said plaintiff included said amounts in her said return.

XVII.

Under the provisions of the Revenue Act of 1938 the federal income tax liability of plaintiff Fernand Mertens, also known as Fernand Gravet, was \$11,470.15 and no more.

XVIII.

Under the provisions of the Revenue Act of 1938 the federal income tax liability of plaintiff Victorine Catherine Renourd Mertens was \$11,470.15 and no more.

XIX.

On March 4, 1940 plaintiff Fernand Mertens, also known as Fernand Gravet, duly filed with the Commissioner of Internal Revenue, through said Nat Rogan, as Collector of Internal Revenue as aforesaid, his sworn claim for a refund of the sum of \$9,199.65, the amount of the overpayment by him of his said [7] federal income tax liability for the year 1938; on March 4, 1940, plaintiff Victorine Catherine Renourd Mertens duly filed with the Commissioner of Internal Revenue, through said Nat Rogan, as Collector of Internal Revenue as aforesaid, her sworn claim for a refund of the sum of \$9,199.65, the amount of the overpayment by her of her said federal income tax liability for the year 1938.

XX.

On July 14, 1941, the Commissioner of Internal Revenue disallowed and rejected the said claim of plaintiff Fernand Mertens, also known as Fernand Gravet, and the said claim of plaintiff Victorine Catherine Renourd Mertens.

Wherefore, plaintiff Fernand Mertens, also known as Fernand Gravet, prays for judgment against defendant in the sum of \$9,199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938 and for his costs of action, and plaintiff Victorine Catherine Renourd Mertens prays for judgment against defendant in the sum of \$9,199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938, and for her costs of action, and plaintiffs further pray for such further and other relief as to this court may seem fit and proper in the premises.

LOEB AND LOEB

By Dwight W. Stephenson

Dwight W. Stephenson

523 West Sixth Street, Los Angeles

Attorneys for Plaintiffs

Dwight W. Stephenson

523 West Sixth Street

Los Angeles, California

Of counsel. [8]

[Verified.]

[Endorsed]: Filed Oct. 28, 1943. [9]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant in the above-entitled action and, in answer to plaintiff's Amended Complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I and II thereof.

II.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs III, IV, V, VI and VII thereof.

III.

Admits the allegations contained in Paragraph VIII thereof, except that the defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiffs received any community income in 1938, or as to the truth of the allegation that plaintiffs received any community income in 1938, or as to the truth of the allegation that the plaintiff, Victorine Catherine [10] Mertens, paid to the said Collector the sum of \$3,249.92 or any other amount on the date alleged, or on any other day. Defendant admits, however, that said sum was paid on said date.

IV.

Admits the allegations contained in Paragraphs IX, X, XI and XII thereof, except that defendant is without knowledge or information sufficient to form a belief

as to the truth of the allegations contained in Paragraphs X and XI to the effect that the income referred to was community income.

V.

Admits the allegations contained in Paragraph XIII, except that defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiffs or either of them paid to the said Collector the sum of \$37,073.27 or any other sum on the date alleged or on any other date. Defendant admits, however, that said sum was paid on said date.

VI.

Denies the allegations contained in Paragraph XIV thereof, except that defendant admits that Nat Rogan, as Collector of Internal Revenue, included in the plaintiffs' income an estimate of the amount payable by Loew's In-

[LRY J] in respect of
corporated to the plaintiff, Fernand Mertens, as re-
~~imbursement~~ for Federal income taxes.

VII.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XV thereof.

VIII.

Denies the allegations contained in Paragraphs XVI, XVII and XVIII thereof.

IX.

Admits the allegations contained in Paragraph XIX thereof, except that defendant denies that there was an

overpayment of tax by the plaintiffs or either of them for the year 1938 or any other year.

X.

Admits the allegations contained in Paragraph XX thereof, except that the Commissioner of Internal Revenue disallowed and rejected the said claim on July [11] 11, 1941, instead of July 14, 1941.

As a Second, Alternative and Separate Defense to plaintiffs' cause of action, defendant alleges:

XI.

Defendant is informed and believes and upon such information and belief alleges that the plaintiffs were not domiciled in the State of California during the year 1938 or at any other time.

XII.

The defendant is informed and believes and on that ground alleges that the earnings of the plaintiff, Fernand Mertens, during the year 1938 and/or the year 1939 were his separate property and were not the community property of the plaintiffs.

XIII.

On the same ground defendant alleges that the moneys with which were paid the alleged income taxes of the plaintiff, Victorine Catherine Renourd Mertens, were the separate property of the plaintiff Fernand Mertens, and never belonged to his wife.

XIV.

On the same ground defendant alleges that one-half of the questioned earnings of the plaintiff, Fernand Mer-

tens, was reported by him and/or his agents as the income of his said wife, for the purpose of reducing his Federal income taxes.

XV.

Regardless of when or in what year the questioned earnings of Fernand Mertens were realized as taxable income, the Federal taxes upon all thereof should be correctly computed as the taxes of Fernand Mertens. In determining the amount of any overpayment in favor of Fernand Mertens, his total taxes for the year or years involved should be credited not only with payments actually made to the Collector in his own name, but also with those made by him or his agents which were purported to have been made for, in behalf and in the name of his wife. [12]

The plaintiff, Victorine Catherine Renourd Mertens, made no overpayment of taxes, and in equity and good conscience is not entitled to a refund in any amount.

As a Third and Separate Defense, defendant alleges:

XVI.

Whether the moneys paid as taxes to the Collector, the recovery of which is here sought, were community property or were the separate property of the plaintiff, Fernand Mertens, the complaint fails to state a claim upon which relief can be granted to the plaintiff, Victorine Catherine Renourd Mertens.

As a Fourth and Separate Defense, defendant alleges:

XVII.

Insofar as the recovery of community moneys wrongfully withheld or of separate moneys of plaintiff, Fernand Mertens, wrongfully withheld, is sought by this action, the plaintiff, Victorine Catherine Renourd Mertens, is not a real party in interest and is not a proper party to the action.

Wherefore, having fully answered, defendant prays that plaintiffs take nothing by their amended complaint, and that the defendant be dismissed with her costs in this behalf expended.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

WALTER S. BINNS

Assistant United States Attorney

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

By Walter S. Binns

Attorneys for Defendant

[Endorsed]: Filed Dec. 4, 1943. [13]

[Title of District Court and Cause.]

NOTICE TO PRODUCE UNDER CALIFORNIA
C. C. P. §1938

To the Above-Named Plaintiffs, and Each of Them, and
to Loeb and Loeb, Their Attorneys:

You and Each of You are hereby requested to produce
at the trial of the above-entitled action:

1. The plaintiffs' retained copies of the following
United States Departing Aliens Income Tax Returns
(Form 1040C):—

(a) of Fernand Mertens (Fernand Gravet), Ac-
tor, verified September 6, 1938, and filed in the Office
of the Collector of Internal Revenue at Los Angeles,
California, on the 7th day of September, 1938, to-
gether with all instruments and documents and
schedules filed concurrently therewith or thereto at-
tached;

(b) of Victorine Martens (Mrs. Fernand Gravet).
verified September 6, 1938, and filed in the Office of
the Collector of Internal Revenue at Los Angeles,
California, on the 7th day of [14] September, 1938,
together with all instruments and documents and
schedules filed concurrently therewith or thereto at-
tached; and

(c) of Victorine Mertens (Mrs. Fernand Gravet),
verified June 21, 1938, and filed in the Office of the
Collector of Internal Revenue at Los Angeles, Cali-
fornia, on the 21st day of June, 1938, together with
all instruments and documents and schedules filed
concurrently therewith or thereto attached.

2. The plaintiffs' retained copies of all other income
tax returns ever filed by the plaintiffs, or either of them,
since the 1st day of January, 1938.

3. All of plaintiffs' working notes and other data used by them or their agents in preparing all of the returns referred to in Items 1 and 2, above.

4. Plaintiffs' retained office copies of all letters and other written communications addressed and sent or delivered to Loew's Incorporated, its agents and representatives, after January 1, 1938, relating to the latter's 1938 employment of the plaintiff, Fernand Mertens, in connection with the production of the photoplay known as "The Great Waltz," and relating to any moneys received or to be received by either plaintiff for the rendition of services by said Fernand Mertens in the production of said photoplay.

5. All original letters and other written communications received by either plaintiff, their agents or representatives, from Loew's Incorporated, its agents and representatives, subsequent to January 1, 1938, and relating to the services referred to in the last Item, numbered 4, above, relating to any and all compensation received and to be received by the plaintiff, Fernand Mertens (Gravet) for such services, and relating to the latter's contract of employment by Loew's Incorporated and/or the terms thereof.

6. All retained copies of all powers of attorney and all other written authorizations addressed by the plaintiffs or either of them to Price Waterhouse and Company, J. R. White, a member of said Company, and to any other person, firm or corporation, the originals of which were sent or delivered to such addressees between January 1, 1938, and the present time, employing and/or authorizing such addressees or any of them to act for the plaintiffs or either of them, [15]

(1st) in the matter of plaintiffs' Federal income taxes for the year 1938, for all subsequent years, and for all fractional portions of said years,

(2d) in the matter of the compensation received and/or to be received by the plaintiff, Fernand Mertens (Gravet) from Loew's Incorporated for services rendered by him in 1938 in the making of the photoplay, "The Great Waltz," and

(3d) in the matter of the prosecution of any refund claims of the plaintiffs of any alleged overpayment or overpayments of Federal income taxes covering the taxable year 1938 and any other taxable year or any taxable period in said years less than a full calendar year.

7. All retained copies of any and all letters and other written communications, the originals of which were signed by the plaintiffs or either of them and sent or delivered to Loew's Incorporated, its agents or representatives, subsequent to January 1, 1938, relating to a purported loan of money by Loew's Incorporated to the plaintiff, Fernand Mertens, on or about the month of September, 1938, and relating to the time or times for the repayment of said purported loan or any part thereof.

8. All original letters and other written communications from Loew's Incorporated, its agents and representatives, addressed to and received by the plaintiffs, or either of them, their agents and representatives, subsequent to January 1, 1938, relating to such purported loan and to the time or times for its repayment or for the repayment of any part thereof.

9. The original contract of employment, dated and entered into on or about the 29th day of July, 1938, between Loew's Incorporated and the plaintiff, Fernand Mertens, also known as Fernand Gravet, relating to

services rendered and/or to be rendered by said plaintiff in connection with the production of the photoplay known as "The Great Waltz."

10. The original of that certain two-page letter dated Culver City, California, July 29, 1938, purporting to be signed by Fernand Gravet, addressed to Loew's Incorporated, Culver City, California, purporting to commence with the [16] words "Concurrently herewith I have entered into an agreement with you covering, among other things, certain terms of my employment in connection with the Photoplay now entitled 'The Great Waltz,' " purporting to end with the words "If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided," and in the lower left hand corner of page two of which there purports to be an approval and acceptance bearing the signature of Loew's Incorporated, signed on its behalf by Benjamin Thau, Assistant Secretary.

11. All canceled checks drawn by the plaintiffs, or either of them, their agents and representatives, in the year 1938, payable to any and all United States Collectors of Internal Revenue, and evidencing the payment of Federal taxes and purported taxes upon income received, or claimed to have been received by the plaintiffs or either of them, in the year 1938.

Dated this 23d day of March, 1944.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

By E. H. Mitchell

Attorneys for Defendant

[Endorsed]: Filed Mar. 23, 1944. [17]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Appearances:

For the Plaintiffs: LOEB & LOEB
GEORGE H. ZEUTZIUS
Los Angeles, California

For the Defendant: CHARLES H. CARR
United States Attorney
EDWARD H. MITCHELL
Assistant U. S. Attorney
Los Angeles, California [18]

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

That plaintiff, Fernand Mertens, also known as Fernand Gravet, do have judgment against the defendant in the sum of \$9199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938; and that plaintiff, Victorine Catherine Renourd Mertens, do have judgment against the defendant in the sum of \$9199.65, together with interest thereon at the rate of six per cent per annum from the 7th day of September, 1938, after reducing, as to each of said plaintiffs, each of said sum so as to limit the refund to the basis of the returns. The computation to be made in accordance with the facts in the case and the rules of this court.

Costs to the plaintiffs.

The Court makes the following findings on the facts involved:

At the time of the payment of the tax on September 7, 1938, the plaintiffs were husband and wife, married

under the law of France, and were resident aliens of the United States.

The income on which the tax sought to be recovered was computed was community property of the plaintiffs.

When the plaintiff, Victorine Catherine Renourd Mertens, departed from the United States in June, 1938, and when the plaintiff, Fernand Mertens, departed from the United States in September, 1938, they did not intend to, and did not surrender, their status as resident aliens, but, on the contrary, they intended to return to the United States.

The taxes sought to be recovered were paid under the provisions of the Revenue Act of 1938, in order to obtain a Certificate of Compliance from the Collector of [19] Internal Revenue, prior to departure from the United States.

In computing the tentative tax liability of each plaintiff herein, Nat Rogan, as Collector of Internal Revenue, wrongfully included in their community property income the sum of \$40,017.41, as income "constructively received" from Loew's Inc., in the year 1938. This for the reason that the evidence shows, not only by a preponderance thereof, but without contradiction, that whatever understandings Fernand Mertens had with Loew's Inc. in regard to the payment of the tax on the income, was changed, when in the face of the erroneous demand of the Collector, the parties to the two agreements of July 29, 1938, (Exhibits 1 and 2) substituted a new agreement whereby it was agreed that Loew's Inc. should advance the tax demanded as a loan, to be adjusted later on when the full tax liability had actually been determined. This could not be done until after the taxable year had ended. All the contemporary conversations, in-

cluding those had in the presence of the representatives of the Internal Revenue Bureau, all the documentary evidence, including the books of account of Loew's Inc., show that the loan arrangement was not a mere book-keeping matter, resorted to with the view of avoiding the tax, but a new arrangement brought on by the erroneous demand of the Internal Revenue Collector.

To treat such a loan as income would require us to disregard unchallenged facts and acts, the good faith of which has not been impugned by the Government, and to substitute therefor highly speculative considerations, which,—despite the good faith of the collector and those who, with the best of motives, now seek to sustain his view—find no support in the record.

I am also of opinion that because the taxpayer did not file within the time required by law, or any legal extension thereof, a full return for the taxable year involved, [20] his recovery should be on the basis of the partial returns on which the tax was paid, rather than on the refund schedules filed later, which claimed deductions for the remainder of the taxable year. The schedules attached to the refund claim cannot take the place of the complete and full return which was never filed.

Hence the ruling above made.

Formal findings and judgment to follow.

Dated this 20th day of April, 1944.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Apr. 20, 1944. [21]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on regularly for trial without a jury, on March 28, 1944, before the above entitled Court, the Honorable Leon R. Yankwich presiding, plaintiffs appearing by their attorneys Loeb and Loeb by George H. Zeutzius and Herman D. Greenschlag, and defendant appearing by Charles H. Carr, United States Attorney, by Edward H. Mitchell, Assistant United States Attorney. Evidence, oral and documentary, and by stipulation of certain of the facts, having been received, the cause having been submitted, the Court having considered the evidence and argument of counsel and having filed its opinion herein on April 20, 1944 ordering judgments for plaintiffs, makes the following:

Findings of Fact

1. This action is for the refund of \$18,399.30, of which each plaintiff claims \$9,199.65, as overpayments of individual [22] income taxes for 1938, plus interest thereon from the date of payment, September 7, 1938.

2. Plaintiffs, Fernand Mertens, known also as Fernand Gravet, and Victorine Catherine Renourd Mertens are and, at all material times were, husband and wife, married under the law of France, and as such husband and wife were resident aliens of the United States during all of 1938, and resided in Los Angeles County. Plaintiffs were in the United States under quota numbers.

3. During all of 1938 and thereafter until his resignation on June 30, 1943, Nat Rogan was the duly appointed, qualified and acting Collector of Internal Revenue

for the Sixth Collection District of the State of California.

4. On August 8, 1943, said Nat Rogan died, testate, and on October 8, 1943, the defendant, Ethel Strickland Rogan, his widow, was by order of the Superior Court of the State of California, in and for the County of San Diego, duly appointed Executrix of the last will and testament of said Nat Rogan, and on said date she duly qualified as such Executrix. Letters testamentary were thereupon issued to her out of said court and she has been ever since and now is the duly appointed, qualified and acting Executrix under said decedent's will.

5. An amended complaint was filed herein on October 28, 1943, in which the aforesaid Executrix, as executrix of the said deceased Collector, was duly substituted and served as defendant herein.

6. During 1938 and prior to July 29 of said year, plaintiff Fernand Mertens rendered services as an actor for Warner Bros. Pictures, Inc., in Los Angeles County, California, and said Warner Bros. Pictures, Inc., during 1938 and prior to September 1 of said year, paid to or for the benefit of Mertens for said services \$10,204.09, which item of gross income is not in dispute.

7. During 1938 and prior to September 14 of said year, plaintiff Fernand Mertens also rendered services as an actor for [23] Loew's Incorporated, at Los Angeles, pursuant to the terms of a written agreement dated July 29, 1938, for the making of a photoplay called "The Great Waltz." In accordance with the terms of said agreement, Loew's Incorporated during 1938 and on and prior to September 14, 1938 of said year, paid Fernand Mertens compensation for said services in the total sum of \$120,000.00.

8. The total combined net incomes of plaintiffs derived by them from all sources within and without the United States for the period January 1, 1938 to and including September 14, 1938 was \$114,832.80, but for the period January 1, 1938 to and including December 31, 1938 it was \$113,735.17. All of said net income was community property income of the plaintiffs.

9. On June 21, 1938 the plaintiff Victorine Catherine Renourd Mertens, desiring to go to France, went to the office of Collector of Internal Revenue, Nat Rogan, at Los Angeles, for the purpose of obtaining a Certificate of Compliance with the Internal Revenue Laws. Said Collector required her to file on said date, as a resident alien, a departing alien income tax return, on Treasury Department Form 1040C, and to report therein her one-half of the community income of herself and plaintiff husband for the period January 1, 1938 to and including June 30, 1938. She paid to said Collector the tentative tax computed by him and demanded thereon of \$3,245.92 with funds loaned by Loew's Incorporated and duly recorded on the latter's books as a loan. Said plaintiff wife thereafter, on June 30, 1938, departed the United States for Paris, France, of which country she was a citizen, When she departed she did not intend to, and did not then, or during 1938, surrender her *her* status as a resident alien but intended to return to the United States.

10. On or before August 30, 1938, plaintiff Fernand Mertens advised said Collector that he intended to depart the United States for Paris, France, on or about September 14, 1938, and desired to [24] obtain the necessary Certificate of Compliance with the Internal Revenue laws of the United States. Before issuing said Certificate, the Collector recomputed the tentative federal income tax liability of plaintiff Victorine Catherine Renourd Mertens

in respect to one-half of the community property incomes of plaintiffs earned between January 1, 1938 and September 14, 1938, inclusive, and estimated her said tax liability for said period to be \$20,669.80. A similar computation of tentative tax liability was made in the amount of \$20,669.80 by said Collector for Plaintiff Fernand Mertens with respect to his half of said community. In making said computations the Collector included in plaintiffs' community property incomes, over the latters' protest, the total sum of \$40,017.41, as his estimate of the amount to be payable by Loew's Incorporated on the theory it would be income "constructively received" from Loew's Incorporated, in 1938.

11. Said sum of \$40,017.41, referred to in the immediately preceding paragraph was algebraically computed and built up by pyramiding taxes under the Collector's said theory that such amount represented the liability of Loew's Incorporated under an agreement dated July 29, 1938, whereunder Loew's had agreed "to pay all taxes which may lawfully be assessed against me (Mertens) in the United States, but only to the extent that such taxes are based upon sums derived by me from my services in connection with said photoplay now entitled 'The Great Waltz.'" By the employment agreement dated July 29, 1938, referred to in paragraph 7 hereof, it was provided that the total compensation to be paid to Mertens for all of his services in said photoplay "shall be \$120,000."

12. The correct amount of tax on said community income of \$120,000 and all other income from all other sources, none of which is in dispute, after proper deductions, was and is \$11,867.40 for each plaintiff, or a total combined sum of \$23,734.80 for the period January 1 to September 14, 1938. The correct amount of tax at-

trib- [25] utable solely to the compensation from Loew's Incorporated, after proper deductions, was even less. When plaintiff and Loew's Incorporated, on or before August 30, 1938 were advised by the Collector that the aggregate taxes would be computed and payment would be demanded in an amount in excess of \$40,000, based upon the Collector's insistence that an amount of \$40,017.41 would have to be added to income before any Certificate of Compliance would be issued, the parties to said agreements of July 29, 1938 promptly substituted a new agreement whereby it was agreed that Loew's Incorporated should advance the amount which was going to be demanded by the Collector as a loan, to be adjusted later on when the full tax liability had actually been determined and ascertained. This could not be done until after the taxable year had ended.

13. On September 7, 1938, the Collector prepared on Treasury Department Forms 1040C, departing alien income tax returns, one for each of the plaintiffs, for the period January 1, 1938 to September 1938, and included therein, in addition to the sum of \$40,017.41 estimated to be an amount "constructively received" from Loew's, all income derived by plaintiffs from all sources within and without the United States during the period January 1, 1938 through September 14, 1938, resulting in an aggregate claimed net income of \$154,850.21, of which one-half or \$77,425.10 was included in each return. The total tax liability shown on each return was \$20,669.80. The total tax for both parties was shown as \$41,339.60, of which \$301.78 represented the total tax attributable to plaintiffs' French community property incomes. After deducting \$1,020.41 representing tax withheld and paid by Warner Brothers, there remained a combined tax balance of \$40,017.41, which was also the exact amount

which the Collector included in plaintiffs' community incomes as "constructively received" from Loew's Incorporated. [26]

14. Plaintiff Fernand Mertens, under a power of attorney from his wife, was required to and did execute before and file with said Collector the aforesaid return prepared for his wife. He also executed and filed the return prepared by said Collector for him. These returns were prepared, executed and filed on September 7, 1938, at which time the amounts of \$19,649.39 and \$17,423.88 were paid to the Collector by plaintiffs, and these amounts, together with the amount hereinabove shown previously to have been paid or withheld aggregated \$20,669.80 and \$20,669.80 respectively. Thereupon, Certificates of Compliance with the Internal Revenue laws were issued to plaintiffs as of September 7, 1938. Plaintiff Fernand Mertens thereafter, on or about September 15, 1938, departed the United States for Paris, France. When he departed he did not intend to, nor did he then, or during 1938, surrender his status as a resident alien but intended to return to the United States.

15. Plaintiffs were on the cash receipts and disbursements basis of accounting and filed their returns on such basis. The taxes demanded and paid by plaintiffs based on their returns filed September 7, 1938 were not assessed by the Commissioner of Internal Revenue until October 17, 1938 and the tentative tax paid by Mrs. Mertens based on the June return was assessed on November 4, 1938.

16. In order to make the aforesaid tax payments on September 7, 1938, Loew's Incorporated, in accordance with its prior substituted agreement with Mertens, advanced the amount of \$37,073.27 as a loan and entered

it on its books accordingly. The amount of \$37,073.27 also included as part thereof the loan of \$301.78 with which Mr. and Mrs. Mertens' taxes attributable to their taxed French income was paid. The said \$37,073.27, as well as the amount of \$3,245.92 which Loew's Incorporated had advanced in June 1938, were valid loans made by Loew's Incorporated to plaintiff and were so posted on its books of account at the time of the transactions [27] and are still carried as an indebtedness due to Loew's Incorporated. The court finds that the foregoing loan arrangement was not a mere bookkeeping matter resorted to with the view of avoiding tax but was a bona fide new arrangement brought on by the erroneous demand of the Collector of Internal Revenue at least a week before the filing of the returns.

17. Plaintiffs did not file returns for the entire calendar year of 1938 on any printed income tax return forms supplied by the Treasury Department. Schedules were, however, attached to claims for refund subsequently filed which disclosed the total of plaintiffs' incomes for the entire year, together with deductions, showing aggregate net incomes slightly less than those shown in the departing alien returns filed on September 7, 1938.

18. On March 5, 1940, plaintiffs each filed a claim for the refund of \$9,199.65, or such amount as is legally refundable, on the ground that the Collector had erroneously added to plaintiffs' combined community incomes for the period January 1, 1938 through September 14, 1938 the amount of \$40,017.41 as income constructively received; that said amount was not constructively received and

should be excluded in computing their said community property incomes. It was further urged by plaintiffs in support of said refund claims that the amount of the tax demanded by the Collector was loaned by Loew's and for that reason also was not income during the taxable periods. The Internal Revenue Agent in Charge at Los Angeles, to whom the refund claims and 1938 returns were referred for examination, protest and hearing thereon, did not question the bona fides of the aforesaid loans, nor was their good faith questioned by the Commissioner of Internal Revenue.

19. On December 4, 1940 plaintiffs filed, by their duly authorized representative, identical letters of protest upon being advised that an examination of their tax returns for 1938 in connection with their claims for refund disclosed, in the opinion of [28] the Internal Revenue Agent in Charge at Los Angeles, no grounds for reduction of plaintiffs' tax liabilities. Following a hearing on the protests, in which it was also set forth that Loew's Incorporated had loaned the sum of \$40,017.41 to plaintiff to enable payment of the aforesaid taxes before departure from the United States, the Commissioner of Internal Revenue, acting through the head of his technical staff for the Pacific Division at Los Angeles, advised each of the plaintiffs, in a letter dated May 29, 1941, that the refund claims would be denied. By letters dated July 11, 1941 addressed to each of the plaintiffs the Commissioner gave official notice of the rejection of said claims. This suit timely followed.

Upon the foregoing findings the Court makes and enters the following:

Conclusions of Law

1. That the plaintiffs have complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this action.

2. That plaintiffs were resident aliens of the United States during the taxable period involved and all of their taxable and taxed incomes constituted their community property, taxable one-half to each.

3. That the amount of \$40,017.41 was unlawfully and erroneously included, one-half in each of the plaintiff's 1938 incomes with respect to which the taxes involved were paid.

4. That the substituted agreement with Loew's Incorporated made, on or about August 30, 1938, pursuant to which the loan of \$40,017.41 was made by Loew's, was a lawful and binding agreement between the parties and its obligation remains in full force and effect. It operated to modify any prior agreements or understandings, was executed in good faith and was and is binding upon all parties and for all purposes.

5. The plaintiff Fernand Mertens overpaid his income taxes [29] for the period January 1 to September 14, 1938, inclusive, in the amount of \$8,802.40.

6. The plaintiff Victorine Catherine Renourd Mertens overpaid her income taxes for the period January 1 to September 14, 1938, inclusive, in the amount of \$8,802.40.

7. Under the law and the evidence each plaintiff is entitled to a judgment against defendant for the principal amount of tax overpayment shown in Paragraphs 5 and 6, respectively, of these conclusions, with interest thereon from September 7, 1938, according to law, plus costs.

Judgments are hereby ordered to be entered accordingly.

Dated: This 29th day of May, 1944.

Leon R. Yankwich
LEON R. YANKWICH,
Judge of the United States
District Court

Approved as to Form:

Charles H. Carr,
United States Attorney
By Edward H. Mitchell
Assistant United States
Attorney. [30]

Received copy of the within Findings of Fact and Conclusions of Law this 18th day of May, 1944 at 2:20 o'clock P. M. E. H. Mitchell, Ass't. U. S. Atty., Attorney for Defendant.

[Endorsed]: Filed May 29, 1944. [31]

In the District Court of the United States
Southern District of California

Central Division

No. 3002-Y Civil

FERNAND MERTENS, also known as FERNAND
GRAVET, and VICTORINE CATHERINE RE-
NOURD MERTENS,

Plaintiffs,

vs.

ETHEL STRICKLAND ROGAN as Executrix of the
Last Will and Testament of NAT ROGAN, Deceased,
Defendant.

JUDGMENT

This cause came on regularly for trial before the Court, without a jury, on the 28th day of March 1944, plaintiffs appearing by Loeb and Loeb, by George H. Zeutzius and Herman D. Greenschlag, defendant appearing by Charles H. Carr, United States Attorney, and Edward H. Mitchell, Assistant United States Attorney, and oral testimony, documentary evidence and evidence by stipulation as to certain of the facts having been received and the cause having been argued and submitted for decision, and the court, being fully advised, having filed herein its decision and order for judgment and findings of fact and conclusions of law, directing that judgments be entered for plaintiffs;

Now Therefore, by reason of the law and the facts herein,

It Is Ordered, Adjudged and Decreed that the plaintiff Fernand Mertens, also known as Fernand Gravet, do have and recover judgment against the defendant in the amount of \$8,802.40, together [35] with interest thereon at the rate of six (6) per centum per annum from September 7, 1938, in accordance with Section 177(b) of the Judicial Code, plus costs of \$.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Victorine Catherine Renourd Mertens do have and recover judgment against the defendant in the amount of \$8,802.40, together with interest thereon at the rate of 6% per annum from September 7, 1938, in accordance with Section 177(b) of the Judicial Code, plus costs of \$34.01.

Dated: This 29th day of May, 1944.

Leon R. Yankwich
LEON R. YANKWICH,
Judge of the United States
District Court

Approved as to form:

Charles H. Carr
United States Attorney
By E. H. Mitchell
Edward H. Mitchell
Assistant United States Attorney

[Endorsed]: Judgment entered May 29, 1944.
Docketed May 29, 1944, C. O. Book 25, page 565. Edmund L. Smith, Clerk, by Louis J. Somers, Deputy.

[Endorsed]: Filed May 29, 1944. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiffs, Fernand Mertens, also known as Fernand Gravet, and Victorine Catherine Renourd Mertens, and Loeb and Loeb, their attorneys:

Notice Is Hereby Given that Ethel Strickland Rogan as Executrix of the Last Will and Testament of Nat Rogan, Deceased, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 29, 1944.

Dated: August 28th, 1944.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

GEORGE M. BRYANT

Assistant United States Attorney

By George M. Bryant

Attorneys for Defendant-Appellant

[Endorsed]: Filed & mailed copy to Loeb & Loeb, attys. for plfs, Aug. 28, 1944. Edmund L. Smith, Clerk, by John A. Childress, Deputy Clerk. [37]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE
ON APPEAL

Upon motion of defendant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 25th day of November, 1944.

Dated this 2nd day of October, 1944.

Leon R. Yankwich

United States District Judge

[Endorsed]: Filed Oct. 2, 1944. [38]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing volume, consisting of 224 pages, numbered from one to 224 inclusive, contains a full, true and correct copy of Amended Complaint; Answer to Amended Complaint; Notice to Produce under California C. C. P. §1938; Order for Judgment; Findings of Fact and Conclusions of Law; Plaintiffs' Computation under Rule 7(h); Judgment; Notice of Appeal; Order Extending Time to Docket Cause on Appeal; Defendant's Designation of Contents of Record on Appeal; Joint Exhibit 1; Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24; Defendant's Exhibits A, B, C, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U and V; which together with Reporter's Transcript, constitute the record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court for the Southern District of California, this 20th day of November, in the year of our Lord one thousand nine hundred and forty-four, and of the Independence of the United States the one hundred and sixty-ninth.

[Seal]

EDMUND L. SMITH,

Clerk of the District Court of the United States for the
Southern District of California,

By R. B. Clifton,

Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Honorable Leon R. Yankwich, Judge Presiding
Los Angeles, California

March 30, 1944

Appearances:

For the Plaintiffs: Loeb & Loeb, Esqs.,
By George Zeitzius, Esq. and
Herman D. Greenschlag, Esq.,
610 Pacific Mutual Building,
Los Angeles, California.

For the Defendant: Charles H. Carr, Esq.,
United States Attorney; by
E. H. Mitchell, Esq.,
Assistant United States
Attorney. [1*]

Los Angeles, California, Thursday, March 30, 1944;
10 A. M.

Mr. Zeitzius: May it please the court, at the outset
I would like, in accordance with our talk in chambers the
other day, to have my admission moved specially to try
this case.

The Court: That is all right; that will be done.

* * * * *

Mr. Greenschlag: All right. I move the admission of
Mr. Zeitzius to practice to try this case.

The Court: All right; Mr. Zeitzius may be admitted
especially for the case. I understand that he is going

*Page number appearing at top of Reporter's Transcript.

through the travail of going through the examination now. [2]

* * * * *

Mr. Mitchell: There are many more questions involved, but I think that covers the primary question, your Honor.

Before stating the government's position, I think counsel will stipulate that the defendant may amend by interlineation the last line of paragraph VI of the answer to plaintiff's amended complaint. That appears on page 2 of the answer at line 19. Does your Honor find it?

The Court: Yes, I have it. [7]

Mr. Mitchell: Line 19, page 2, the amendment being to strike out the following words in line 19: "and to the plaintiff Fernand Mertens as reimbursement for."

The Court: Yes.

Mr. Mitchell: And in lieu thereof, insert the words "in respect of."

Mr. Zeitzius: That is agreed to.

The Court: All right. You had better write that in, Mr. Mitchell, and I will initial it.

Mr. Mitchell: Very well.

The Court: The amendment has been made by interlineation. [8]

* * * * *

Mr. Zeitzius: First of all, I will introduce into evidence a stipulation of a large portion of the facts in the case, together with Exhibits A to E attached thereto.

The Court: The stipulation and the exhibits will be received. Do you want them as a joint exhibit, Mr. Mitchell?

Mr. Mitchell: Very well; yes, your Honor.

The Court: As a joint exhibit, so long as you are both relying on what is in there.

Mr. Zeitzius: There is just one sentence at the very end on the last page, where we object to a single sentence on the ground it is immaterial, irrelevant and incompetent, has nothing to do with the issues in this case. [14]

* * * * *

The Court: I will reserve ruling upon that question, and the document will be received with that reservation, [15] that no ruling will be made at the present time upon the materiality of the allegation which is set forth on lines 14 and 15 of page 5 of the stipulation of facts.

Mr. Zeitzius: All right. Then, at this time, in accordance with the—

The Clerk: Joint Exhibit 1.

Mr. Mitchell: Excuse me. Is the stipulation of facts given an exhibit number?

The Court: Yes; we will give it "Joint Exhibit No. 1."

Mr. Mitchell: Joint exhibit.

(The document referred to was marked Joint Exhibit 1, and received in evidence, subject to ruling of the Court.)

[JOINT EXHIBIT 1]

In the District Court of the United States Southern District of California Central Division

Fernand Mertens, also known as Fernand Gravet, and Victorine Catherine Renourd Mertens, Plaintiffs, vs. Ethel Strickland Rogan, as Executrix of the Last Will and Testament of Nat Rogan, Deceased, Defendant. No. 3002-Y Civil

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective counsel that the following facts may be taken as true upon the trial of the above-entitled case, without prejudice however to the right of either party to offer such further evidence as he may deem necessary not inconsistent with the facts herein stipulated:

1. This action, filed June 29, 1943, is for the refund of \$18,399.30, of which each plaintiff claims \$9,199.65, as alleged overpayments of individual income taxes, plus interest thereon from the date of payment, September 7, 1938.

2. Plaintiffs are and, at all material times were, husband and wife. Plaintiff Fernand Mertens, known also as Fernand Gravet, is and at all times material hereto was a citizen [42] of Belgium. Plaintiff Victorine Catherine Renourd Mertens is and at all times material hereto was a citizen of France. Between January 1, 1938, and September 14, 1938, plaintiffs were "resident aliens" of the United States (within the meaning of the applicable Revenue Act) and resided in Los Angeles County. The parties do not stipulate as to plaintiffs' residential status before and after said period. Plaintiff Fernand Mertens

(Joint Exhibit 1)

departed from the United States on or about September 14, 1938, for Paris, France, and has not since returned to the United States. Plaintiff Victorine Mertens departed from the United States on or about June 30, 1938, for Paris, France, and has not since returned to the United States. The parties do not stipulate as to the place of domicile of the plaintiffs at any time.

3. During all of the year 1938 and thereafter until his resignation on June 30, 1943, Nat Rogan was the duly appointed, qualified, and acting Collector of Internal Revenue for the Sixth Collection District of the State of California.

4. On August 8, 1943, said Nat Rogan died, testate, and on October 8, 1943, the defendant, Ethel Strickland Rogan, his widow, was by order of the Superior Court of the State of California, in and for the County of San Diego, duly appointed executrix of the last will and testament of said Nat Rogan, and on said date she duly qualified as such executrix. Letters testamentary were thereupon issued to her out of said court and she has been ever since and now is the duly appointed, qualified, and acting executrix under said decedent's will.

5. An amended complaint was filed herein on October 28, 1943, in which the aforesaid executrix, as executrix of the said deceased Collector, was substituted and served as defendant herein.

6. During 1938 and prior to July 29 of said year, plaintiff Fernand Mertens rendered services as an actor for [43] Warner Bros. Pictures, Inc., in Los Angeles County, California, and said Warner Bros. Pictures, Inc., during 1938 and prior to September 1 of said year, paid to or for the benefit of said Mertens for his services the

(Joint Exhibit 1)

sum of \$10,204.09, which item of gross income is not in dispute.

7. During 1938 and prior to September 14 of said year, said plaintiff also rendered services as an actor for Loew's Incorporated, pursuant to the terms of a written agreement, a copy of which, or the original, will be offered in evidence. In accordance with the terms of said agreement, Loew's Incorporated during 1938 and prior to September 14, 1938, of said year, paid said plaintiff for said services the sum of \$120,000.00, exclusive of any amounts which may have been paid on account of taxes.

8. On June 24, 1938, each of the plaintiffs executed separate powers of attorney to L. G. Sutherland, J. R. White, and J. L. Wilson of Price, Waterhouse & Co. These powers were duly filed with the proper officials of the Treasury Department. True copies of said powers of attorney, marked Exhibits "A" and "B" are attached hereto and by reference made a part hereof.

9. On or about June 30, 1938, the aforesaid J. R. White and others assisted plaintiff Victorine Mertens in obtaining a certificate of compliance with federal tax statutes and regulations in order that she might depart the United States for France. Accordingly, a departing alien income tax return was executed by Mrs. Mertens for the period beginning January 1, 1938, and ending June 30, 1938, reporting one-half of the earnings of the plaintiff husband received during said period to June 30, 1938, and reporting a tax liability of \$3,245.92, which was thereupon paid to Nat Rogan as Collector of Internal Revenue. True copies of said return will be offered in evidence.

(Joint Exhibit 1)

10. Prior to September 7, 1938, plaintiff Fernand Mertens advised the office of said Collector of Internal Revenue [44] that he intended to depart the United States for France on or about September 14, 1938, and desired to obtain the necessary certificate of compliance with the Internal Revenue Laws of the United States.

11. On September 7, 1938, plaintiffs filed separate departing alien income tax returns. Copies of the two separate returns so filed by plaintiffs, together with the documents accompanying them, will be offered in evidence. Plaintiffs' said returns were filed on the cash receipts and disbursements basis of accounting.

12. Each of the plaintiffs filed a claim for refund on March 5, 1940. Said claims will be offered in evidence.

13. On December 4, 1940, plaintiffs each filed, by their duly authorized representative, identical letters of protest, except as to name, with the Internal Revenue Agent in Charge at Los Angeles. A true copy of one of the letters of protest marked Exhibit "C" is attached hereto and by reference made a part hereof.

14. By separate identical letters, except as to names, dated May 29, 1941, the Commissioner of Internal Revenue advised plaintiffs that their claims for refund would be disallowed and that notice of disallowance would be forwarded at a later date. A true copy of one of said letters marked Exhibit "D" is attached hereto and by reference made a part hereof.

15. By two separate letters dated July 11, 1941, the Commissioner of Internal Revenue advised plaintiffs that their claims for refund were disallowed in full. True copies of said letters marked Exhibits "E" and "F" are attached hereto and by reference made part hereof.

(Joint Exhibit 1)

16. Other than the three departing alien income tax returns executed by the plaintiffs in June and September, 1938, as above stipulated, no income tax return or returns on printed income return forms supplied by the Treasury Department, either [45] original, supplemental, or amen-datory, reporting income of either of the taxpayers for the year 1938, or for any part thereof, was or were ever filed with the Treasury Department by the plaintiffs, or either of them, prior to the commencement of this action.

17. Prior to 1938 and continuing until December 31, 1943, Leon Levi was an attorney at law in the employ of the firm of Loeb and Loeb, attorneys of record for the plaintiffs in this case. He became a member of the firm on January 1, 1941, but left the firm on December 31, 1943. Frank Keesling was an attorney at law in the employ of said Loeb and Loeb from and after July 17, 1939. He became a member of the firm on January 1, 1943, but is now serving in the armed forces and left California about February, 1944. Said law firm of Loeb and Loeb is, and continuously since and prior to 1938 has been Los Angeles counsel for Loew's Incorporated. Plaintiffs expressly hereby reserve the right to object to the admission of the immediately preceding sentence on grounds of relevancy, materiality, and competency.

Dated: March 30, 1944.

LOEB AND LOEB

By Herman D. Greenschlag
Attorneys for Plaintiffs

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

By E. H. Mitchell

Attorneys for Defendant [46]

(Joint Exhibit 1)

EXHIBIT A

Know All Men By These Presents:

That I, Fernand Mertens, of 10425 Wilshire Boulevard, Beverly Hills, California, have made, constituted and appointed, and by these presents do make, constitute and appoint L. G. Sutherland, J. R. White and J. L. Wilson of Messrs. Price, Waterhouse & Co., residents of Washington, D. C., Glendale and Los Angeles, California, respectively, my true and lawful attorneys for me and in my name, place and stead to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United States and to represent me in all matters pertaining to the Federal tax returns filed by me; to have access to and examine all documents and data in the possession of the Treasury Department with respect to my liability for income and profits taxes and other Federal taxes under any statutes of the United States imposing such taxes and to secure from the Treasury Department such information relative thereto that may be necessary in order to determine my liability for all Federal taxes. All powers of attorney previously filed by me are hereby revoked and canceled.

Giving and granting unto my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorneys or their substitute shall lawfully do or cause to be done by virtue hereof.

(Joint Exhibit 1)

In Witness Whereof, I have signed and sealed these presents this 24th day of June 1938.

FERNAND GRAVET MERTENS (Signed)

Subscribed and sworn to before me this 24th day of June, 1938

Seal

MARJORIE KING (Signed)

Notary Public in and for the county of Los Angeles,
state of California

My commission Expires Feb. 14, 1942. [47]

This is to certify that neither Price, Waterhouse & Co. nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Fernand Mertens in the matter of Federal income taxes.

PRICE, WATERHOUSE & CO.

By R. W. Williams, a partner (Signed) [48]

EXHIBIT B

Know All Men By These Presents:

That I, Victorine Catherine Renourd Mertens, of 10425 Wilshire Boulevard, Beverly Hills, California, have made, constituted and appointed, and by these presents do make, constitute and appoint L. G. Sutherland, J. R. White and J. L. Wilson of Messrs. Price, Waterhouse & Co., residents of Washington, D. C., Glendale and Los Angeles, California, respectively, my true and lawful attorneys for me and in my name, place and stead to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United

(Joint Exhibit 1)

States and to represent me in all matters pertaining to the Federal tax returns filed by me; to have access to and examine all documents and data in the possession of the Treasury Department with respect to my liability for income and profits taxes and other Federal taxes under any statutes of the United States imposing such taxes and to secure from the Treasury Department such information relative thereto that may be necessary in order to determine my liability for all Federal taxes. All powers of attorney previously filed by me are hereby revoked and canceled.

Giving and granting unto my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorneys or their substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have signed and sealed these presents this 24th day of June, 1938.

VICTORINE CATHERINE RENOURD MERTENS
(Signed) [49]

Subscribed and sworn to before me this 24th day of June 1938

(Seal) MARJORIE KING (Signed)
Notary Public in and for the county of Los Angeles,
state of California

My Commission Expires Feb. 14, 1942

(Joint Exhibit 1)

This is to certify that neither Price, Waterhouse & Co. nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Victorine Catherine Renourd Mertens in the matter of Federal income taxes.

PRICE, WATERHOUSE & CO.

By R. W. Williams, a partner (Signed) [50]

EXHIBIT C

Internal Revenue Agent in Charge,
Twelfth Floor, United States Post Office
and Court House Building,
Los Angeles, California.

In the matter of proposed disal-)	
lowance of claim for refund of)		
income tax for the calendar)		
year 1938 in the amount of)	Reference IT:R	
\$9,199.65 filed by)	Treasury Department	
Fernand Mertens,)	letter dated	
c/o Messrs. Price, Waterhouse)	November 8, 1940	
& Co.,)		
530 West Sixth Street)		
Los Angeles, California,)		
A non-resident alien)		

Dear Sir:

LETTER OF PROTEST

Under date of November 8 1940 a Treasury Department letter was addressed to taxpayer proposing to dis-

(Joint Exhibit 1)

allow his claim for refund of Federal income taxes paid for the calendar year 1938 in the amount of \$9,199.65. Taxpayer was granted a period of thirty days within which to file a protest with the Internal Revenue Agent in Charge at Los Angeles.

The taxpayer hereby protests against the action of the revenue agent in recommending disallowance of the claim. The grounds upon which he relies in support of his protest are as follows:

Taxpayer, a non-resident alien, in all of his income tax returns has reflected his income by the cash receipts and disbursements method. In 1938 Loew's Incorporated loaned \$40,017.41 to taxpayer to enable him to pay his and his wife's income tax liabilities before departure from the country. It is respectfully contended that this amount was not constructively [51] received as income in 1938. The facts are set forth in the claim for refund filed by taxpayer which by this reference is made a part of this protest.

Taxpayer respectfully submits that his Federal income tax for the calendar year 1938 has been overpaid in an amount of \$9,199.65 and it is requested that an over-assessment in this amount be determined and the claim for refund approved.

* * * * *

It is respectfully requested that an oral hearing be granted taxpayer or his representatives before an ad-

(Joint Exhibit 1)

verse decision is rendered in any of the matters herein set forth.

Yours very truly,

FERNAND MERTENS

by.....

Attorney in fact

Los Angeles, California [52]

[illegible]

J. R. White, being duly sworn, deposes and says that under power of attorney dated June 24, 1938 and filed with the Collector of Internal Revenue at Los Angeles he is authorized to represent Fernand Mertens, the taxpayer in whose behalf the foregoing protest is submitted; that the foregoing protest was prepared under his supervision and that although he does not know of his own knowledge that the statements therein are true and correct, such statements are true and correct to the best of his information and belief.

J. R. White

Subscribed and sworn to before me this day
of December 1940

Notary Public in and for the County of Los Angeles,
State of California. [53]

(Joint Exhibit 1)

EXHIBIT D

TREASURY DEPARTMENT

Bureau of Internal Revenue
Pacific Division, Technical Staff
1714 U. S. Post Office and Courthouse
Los Angeles, Calif.

Office of
Commissioner of Internal Revenue

May 29 1941

Address reply to
Head, Pacific Division, Technical
Staff and refer to
C-TS:PD
LA:AMS

Mr. Fernand Mertens
c/o Price, Waterhouse & Co.
530 West 6th Street
Los Angeles, California

In re: Income Tax
Year: 1938

Sir:

Reference is made to the above-entitled case, which was referred to this office for consideration pursuant to your request dated December 23, 1940 addressed to the Revenue Agent in Charge, Los Angeles, California, and to a conference held in this office on May 23, 1941.

You are advised that inasmuch as the taxable period was terminated in accordance with the provisions of section 146 of the Revenue Act of 1938 and the income tax liability due therefor was properly assessed and paid on September 7, 1938, your contention that the taxes paid

(Joint Exhibit 1)

in your behalf by Loew's Incorporated were not then constructively received must be denied: [54]

Inasmuch as your status after September 14, 1938 was that of a non-resident alien, any income received or losses sustained from sources without the United States subsequent to your departure would have no effect upon net income determined as of the date your taxable period was terminated. Therefore, the income tax assessed on September 7, 1938 constitutes your correct tax liability for the calendar year 1938.

The statutory notice of the disallowance of your claim will be forwarded to you at a later date by registered mail, in accordance with the provisions of section 3772(a) (2) of the Internal Revenue Code

Respectfully,

(Signed) Virgil Bean

T

Virgil Bean

Head, Pacific Division

Technical Staff [55]

EXHIBIT E

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue and

Refer to

IT: C1: CC-4-CCP

(Joint Exhibit 1)

July 11 1941

Mr. Fernand Mertens,
c/o Price, Waterhouse & Company,
530 West 6th Street,
Los Angeles, California
In re: Claim for refund of \$9,199.65
For the year 1938

Sir:

Reference is made to letter dated May 29, 1941 wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.

In accordance with the provisions of existing internal revenue law, notice is hereby given of the disallowance of your claim in full.

Respectfully,

GUY T. HELVERING,

Commissioner,

By F. Mooney (Signed)

Deputy Commissioner

213M (Revised) [56]

EXHIBIT F

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue Commissioner
and Refer to

IT: C1: CC-4-CCP

(Joint Exhibit 1)

July 11 1941

Mrs. Victorine C. R. Mertens,
c/o Price, Waterhouse & Company
530 West 6th Street,
Los Angeles, California
In Re: Claim for refund of \$9,199.65
For the year 1938

Madam:

Reference is made to letter dated May 29, 1941 where-
in you were informed that the claim for refund indicated
above would be disallowed. The letter also stated the rea-
sons for the proposed disallowance.

In accordance with the provisions of existing internal
revenue law, notice is hereby given of the disallowance of
your claim in full.

Respectfully

GUY T. HELVERING,
Commissioner,
By F. Mooney (Signed)
Deputy Commissioner

213M (Revised)

[Endorsed]: Case No. 3002-Y Civ. Mertens vs. Rog.
Joint Exhibit 1. Date 3/30/44. Joint 1 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [57]

Mr. Zeitzius: In accordance with paragraph numbered
7 of the stipulation, Joint Exhibit 1, I wish to offer into
evidence two documents, which I will have marked in a
moment by the clerk, which I would like to show to Mr.
Mitchell.

Mr. Mitchell: May I see the originals?

Mr. Zeitzius: Yes, surely. With consent of counsel, I offer into evidence the photostats of the two original documents which are covered by paragraph 7 of the stipulation of facts and ask that they be marked.

The Clerk: Plaintiffs' Exhibits 1 and 2. Which do you desire marked first?

Mr. Mitchell: Defendant has no objection, with counsel's assurance that those are the signatures of the [16] parties to the originals. They are the signatures of the parties, is that correct, Mr. Zeitzius?

Mr. Zeitzius: That is my understanding from the gentlemen who sit here, from Loew's representative.

Mr. Mitchell: Which will be Plaintiffs' 1, and which will be Plaintiffs' 2?

The Court: Mr. Somers will tell you.

The Clerk: The photostat of the letter dated July 29th, 1938, addressed to "Mr. Fernand Gravet," will be Plaintiffs' Exhibit 1; and the letter dated July 29th, 1938, photostat, addressed to "Loew's Incorporated," will be Plaintiffs' Exhibit 2.

(The documents referred to were marked Plaintiffs' Exhibits Nos. 1 and 2, and received in evidence.)

[PLAINTIFFS' EXHIBIT 1]

Culver City, California
July 29th, 1938

Mr. Fernand Gravet,
Culver City, California.

Dear Mr. Gravet:

This will confirm the following understanding and agreement between us:

(Plaintiffs' Exhibit 1]

1. The contract between you and Mervyn LeRoy dated May 6, 1936, as the same has heretofore been amended and/or extended, has, with your consent, been assigned by Mr. LeRoy to the undersigned and we have accepted the same with the restriction that by our acceptance of the same we are assuming no liability under said contract except such liability thereunder as has arisen subsequent to April 15, 1938 in connection with the photoplay now entitled "The Great Waltz." Said contract of May 6, 1936, as the same may have heretofore been amended and/or extended, is hereinafter for convenience referred to as the "old contract."

2. It is hereby agreed that your services in said photoplay "The Great Waltz" shall continue until the completion thereof, and that your services in said photoplay shall be rendered upon the terms and conditions set forth in said old contract except as follows:

(a) That the total compensation to be paid to you for all of your services in said photoplay including such services as we may hereafter require of you in connection with retakes, added scenes, changes, sound track, process shots, etc., etc. shall be One Hundred Twenty Thousand Dollars (\$120,000.00) inclusive of such sums as have been paid to you for services rendered by you from April 15, 1938 to the date hereof.

(b) That for said total sum of One Hundred Twenty [58] Thousand Dollars (\$120,000.00) we shall be entitled to your actual services in connection with said photoplay for a period or aggregate of periods of twenty (20) weeks. Of said One Hun-

(Plaintiffs' Exhibit 1]

dred and Twenty Thousand Dollars (\$120,000.00) the sum of Seventy Two Thousand Dollars (\$72,000.00) has already been paid you, the balance to-wit: the sum of Forty Eight Thousand Dollars (\$48,000.00) shall be paid to you in weekly installments of Six Thousand Dollars (\$6,000.00) each for each week during which you render services for us hereunder. It is understood that in computing said period or aggregate of periods of twenty (20) weeks there shall be excluded the time between the completion of the ordinary photographing of said photoplay and the commencement of retakes, added scenes, changes, sound track, process shots, etc. etc., and in connection with retakes, added scenes, changes, sound track, process shots, etc. etc. only the day or days on which he actually renders services shall be included. Should the aggregate amount so payable to you between now and September 15, 1938 be less than Forty Eight Thousand Dollars (\$48,000.00), then the difference shall be paid to you upon the completion by you of all of your services in said photoplay including the completion of all of your services in connection with retakes, added scenes, changes, sound track, process shots, etc. etc., but in no event later than September 15, 1938.

(c) That you will remain available in Los Angeles until the completion of your services in said photoplay and including the completion of your services in retakes, added scenes, changes, sound track, process shots, etc. etc. provided, however, that you will not be required to remain available hereunder after September 15, 1938. [59]

(Plaintiffs' Exhibit 1]

(d) Said old contract shall be deemed to be modified and amended to the extent necessary to conform to the provisions of this instrument, but not otherwise.

3. On condition that you fully and completely keep and perform each and all of your obligations under said old contract as hereby modified, your employment under said old contract shall be deemed to be terminated as of the expiration of September 15, 1938 or as of the completion by you of all of your services in connection with said photoplay, including your services in retakes, added scenes, sound track, process shots, etc., etc., whichever shall be later; provided, however, that notwithstanding anything elsewhere herein contained our mutual obligations with respect to dubbing said photoplay into French shall be as provided in the employment contract attached hereto marked "Exhibit A," it being understood that such dubbing shall be performed between October 15, 1938 and December 15, 1938 if we so elect and if you are in France during such period, or, if we so elect, at such subsequent time or times when you are in France.

4. Attached hereto marked "Exhibit A" is a form of employment contract between you and ourselves for a proposed term of one (1) year with certain rights of extension. We hereby offer to enter into a contract with you identical in terms with said "Exhibit A"; provided, however, that this offer shall be null and void unless accepted by you by notice in writing or by telegraph or by cable to be delivered to us at our Culver City studio on or before October 15, 1938. In the event of the acceptance by you of this offer, you agree to deliver to

(Plaintiffs' Exhibit 1]

us five (5) copies of a contract identical with "Exhibit A," each of said five (5) copies to be duly executed by you, such delivery of said executed contracts to be made by you on or before [60] November 15, 1938. If said five (5) copies are so delivered to us on or before November 15, 1938, we will execute and return to you two (2) fully completed copies of the same. In the event of the acceptance by you of this offer you agree that between the completion of your services hereunder and January 1, 1939 you will not render any services to or for any other person, firm or corporation excepting only services in stage plays in France or services in photoplays to be produced, released or exhibited only in the French language or in radio broadcasts or in the making of phonograph records.

If all of the foregoing is in accordance with your understanding of our agreement, please so indicate by your acceptance hereof in the space hereinbelow provided.

Yours very truly,

LOEW'S INCORPORATED

By Benjamin Thau

~~Vice President~~

Assistant Secretary

Approved and Accepted:

Fernand Gravet

(Fernand Gravet)

[Endorsed]: Case No. 3002-Y. Mertens vs. Rogan. Pltf. Exhibit 1. Date 3/30/44. No. 1 Identification. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [61]

[PLAINTIFFS' EXHIBIT 2]

Culver City, California

July 29th, 1938

Loew's Incorporated,
Culver City, California.

Gentlemen:

Concurrently herewith I have entered into an agreement with you covering, among other things, certain terms of my employment in connection with the photoplay now entitled "The Great Waltz"; said agreement being hereinafter for convenience referred to as the "employment agreement." This will confirm our further understanding with respect to the same:

1. On condition that I keep and perform my obligations under said employment agreement, you agree to pay all taxes which may lawfully be assessed against me in the United States, but only to the extent that such taxes are based upon sums derived by me from my services in connection with said photoplay now entitled "The Great Waltz." The provisions of this paragraph 1 shall be in lieu and in stead of any and all provisions with respect to the payment of taxes contained in my contract of employment with Mervyn LeRoy dated May 6, 1936 as the same may have heretofore been amended and/or extended. Both you and I agree to use every effort to the end that said taxes will be paid by September 10, 1938 and to the end that I shall be free to leave the United States on that date and to return whenever I desire or whenever I may be required to return.

2. I agree that in all matters in which I have any discretion, and which pertain to or affect the determination or extent of my tax liabilities in the United States, I will exercise such discretion in such manner and at such times as you may desire. Without limiting the gen-

(Plaintiffs' Exhibit 2)

erality of the foregoing, and solely by way of explaining the meaning [62] thereof, I agree, for example, that in matters wherein I have a choice, as in whether returns shall be filed on a community property or separate property basis, whether returns shall be filed on a cash or accrual basis, whether returns shall be filed on a fiscal or calendar year basis, etc., I will use such choice or selection as you may designate.

3. In the event that after having made any such choice or choices, as hereinabove in paragraph 2 described, it should ultimately and finally be determined that said choice was erroneous or unlawful, and if by reason thereof any additional tax is assessed against me, you will pay such additional assessment, but only to the extent however, that such additional assessment is due to or occasioned by moneys originally received by me from you or paid by you for me under or pursuant to said employment agreement.

4. It is agreed further that in the case of any original assessment or additional assessment, the amount of my tax to be borne by you shall be computed and determined as though the moneys received by me or paid by you under said employment agreement were and had been the only moneys received by me from any source whatsoever during the tax period or periods as to which such assessment or additional assessment has accrued, excepting only, however, certain moneys heretofore during the calendar year 1938 received by me from and/or paid for my account by Warner Bros. Pictures, Inc. With respect to said Warner Bros. Pictures, Inc. payments, it is agreed that in computing the portion of my taxes for which you are to be liable said Warner Bros. Pictures, Inc. payments are to be deemed to have been the first and lowest

(Plaintiffs' Exhibit 2)

bracketed payments received by me during 1938, and your liability shall be computed on the basis of the income with respect to which you are to pay taxes having been received after and on top of said Warner Bros. [63] Pictures, Inc. payments.

If the foregoing is in accordance with your understanding and agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Yours very truly,

Fernand Gravet
(Fernand Gravet)

Approved and Accepted:

LOEW'S INCORPORATED

By Benjamin Thau

~~Vice President~~

Assistant Secretary

[Endorsed]: Case No. 3002. Merten vs.
Pltfs. Exhibit 2. Date 3/30/44. No. 2 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. L. J.
Somers, Deputy. [64]

* * * * *

Mr. Zeitzius: I offer into evidence, by agreement so far as the form in which they happen to be, that is, they [17] are photostatic and not the original documents—I offer into evidence a photostat of the original return—

Mr. Mitchell: Form 1040C.

Mr. Zeitzius: —on Form 1040C, signed by Mrs. Mertens in June of 1938, and ask that it be duly marked as an exhibit.

Mr. Mitchell: No objection. Plaintiffs' Exhibit 3?

Mr. Zeitzius: That is right.

The Clerk: Yes.

(The document referred to was marked Plaintiffs' Exhibit 3, and received in evidence.)

(FORM 1040C)

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN
For Taxable Period

Do not write in this space
Serial Number

Amount Paid, \$

PRINT NAME AND HOME ADDRESS PLAINLY BELOW

OCCUPATION

RECEIVED
WIFE ARRIVAL
JUN 21 1938
COLL INT REV
LOS ANGELES CA
6068

What country are you a resident of?

Check the appropriate block box to indicate your status:
Class I. Nonresident alien, not engaged in business in the United States, and having a gross income not exceeding \$20,000, or an alien engaged in business in the United States, and having a gross income not exceeding \$20,000, who is not a resident of the United States.
Class II. Nonresident alien, engaged in business in the United States, and having a gross income exceeding \$20,000, or an alien engaged in business in the United States, and having a gross income exceeding \$20,000, who is a resident of the United States.
Class III. Resident alien.

Taxable income reported Tax paid District in which return was filed
There may be pending and uncollected taxes on your United States income tax which are taxable over a period other than the taxable period covered by this return, to the best of your knowledge and belief.

COMPUTATION OF TAX
Aliens in Class I

Gross income (line 20, Schedule C)
Tax liability (10% of item 1, 6% of item 1 if resident alien)
Income tax paid at source
Tax paid at previous departure applicable to taxable year
Balance of tax (item 2 minus item 3 and 4)
Aliens in Class II
Net income (line 20, Schedule C)
Less: Personal exemption
Credit for dependents
Balance (surplus net income)
Less: 10% on U. S. obligations, etc., reported in Schedule C
Earned income credit
Balance subject to normal tax
Normal tax (4% of item 12)
Surplus on item 9
Total of items 13 and 14
Total tax (item 15, or 10% of line 20, Schedule C, whichever is larger)
Less: Income tax paid at source
Tax paid at previous departure applicable to taxable period
Balance of tax (item 16 minus items 17 and 18)
Aliens in Classes III and IV
Less: Income (line 20, Schedule C)
21. Less: Personal exemption
22. Credit for dependents
23. Business surplus net income
24. Less: Interest on U. S. obligations, etc., reported in Schedule C
25. Earned income credit
26. Balance subject to normal tax
27. Normal tax (4% of item 26)
28. Surplus on item 23
29. Total tax (items 27 and 28)
30. Less: Income tax paid at source
31. Tax paid at previous departure applicable to taxable period
32. Balance of tax (item 29 minus items 30 and 31)

Schedule A. EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 11, AND 22. (See Instruction 9)

(a) Personal Exemption			(b) Credit for Dependents		
Status	Number of months during taxable period in each status	Credit claimed	Name of dependent and relationship	Number of months during taxable period	Credit claimed
				Under 18 years old	Over 18 years old
Single, or married and not living with husband or wife					
Married and living with husband or wife					
Head of family					

Schedule B. COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$3,000, or less	(b) For Net Income in Excess of \$3,000
Net income (line 20, Schedule C)	1. Earned net income (not over \$14,000)
Earned income credit (10% of line 1, above)	2. Net income (line 20, Schedule C)
	3. Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$300)

GROSS INCOME

267215

DEDUCTIONS (Not to be claimed by aliens in Class I)

income (line 20 plus line 29)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, and that I/we are not aware of any facts that would require disclosure under the applicable revenue acts and the regulations issued thereunder.

James F. McDonald
Wagoner and I the of other administering with

DEPUTY COL

If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

This certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax returns with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of sale indicated above, according to all information available to me at this date.

193



By

Chief Office Deputy

(Collector of Internal Revenue, or Licensed Revenue Agent in Charge)

Tides

FERNAND MERTENS

(known professionally as Fernand Gravet)

VICTORINE CATHERINE REMOND MERTENS

DATA FOR INCOME TAX LIABILITY OF MRS. MERTENS
TO DATE OF DEPARTURE JUNE 25 1938

Income from salary:

Warner Bros. Pictures, Inc.
Metro-Goldwyn-Mayer Studios

\$10,204.09

48,000.00

\$58,204.09

Deduct:

Commissions paid agent, Mrs. Ad. Schulberg

5,237.50

Net income from sources within United States

\$52,966.59

Income from other sources:

Rentals from flats in Paris -
34,000 francs for year 1938
converted .0278-7/8 (rate
published in Wall Street Journal
for June 30 1938) equals

\$945.18

For six months ending June 30 1938

474.09

Total income

\$53,440.68

Amount taxable to Mrs. Mertens - one-half

\$26,720.34

*State of California
County of Los Angeles*

J. R. White, acting on behalf of Messrs
Pierce Waterhouse & Co. 530 W. Sixth St. Los Angeles
as advisor to Mrs. Mertens affirms that he
prepared the attached statement showing income
available to Mrs. Mertens of \$26,720.34 on
the basis of information furnished by Louis
D. Cooperstock, Warner Bros. Pictures Inc. and
Mr. Mertens without independent verification
and that to the best of his knowledge and
belief the information contained therein is true
and correct although he does not know of his own
knowledge that the information is true and correct

J. R. White

Subscribed and sworn to
before me this 21st day
of June 1938

Joe F. McDonald D.C.

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 3. Date 3/30/44. No. 3 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

Mr. Zeitzius: I offer into evidence as Plaintiffs' Exhibit 4, the taxpayer's copy of Form 1040C which is the Plaintiffs' Exhibit 3. This one now is Plaintiffs' Exhibit 4. I think your Honor must benefit more by looking at the larger copy and it will be easier to read.

(The document referred to was marked Plaintiffs' Exhibit 4, and received in evidence.) [18]

Department
8298
New York
beginning Jan 1
June 29-35
Travel
One @
Country was
N.Y.
Tax paid
4592.07
Pending any
for knowledge and help

(FORM 1040-C)
(Revised Feb. 1935)

Internal Revenue Service

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN

For Taxable Period

PRINT NAME AND HOME ADDRESS MAINLY IN FULL
Mildred Martine Mrs Bernard E
10425 Clithure Blvd
Westwood Calif
OCCUPATION: Housewife
Travel

Do not write in this space
Serial Number
Amount Paid
JUN 31 1935
CALIF
By

Date on which you last arrived in the United States June 11-1935
District in which return was filed
Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.
Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.
Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.
Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.

COMPUTATION OF TAX

Aliens in Class I

Net income (line 20, Schedule C)
Less: Personal exemption
Credit for dependents
Balance (surplus net income)
Less: Interest on U.S. obligations, etc., reported in Schedule C
Earned income credit
Balance subject to normal tax
Normal tax (4% of item 26)
Surplus on item 26
Total tax (items 27 and 28)
Less: Income tax paid at source
Tax paid at previous departure applicable to taxable period
Balance of tax (item 29 minus items 28 and 31)

Aliens in Class II

Aliens in Classes III and IV

Net income (line 20, Schedule C)
Less: Personal exemption
Credit for dependents
Balance (surplus net income)
Less: Interest on U.S. obligations, etc., reported in Schedule C
Earned income credit
Balance subject to normal tax
Normal tax (4% of item 26)
Surplus on item 26
Total tax (items 27 and 28)
Less: Income tax paid at source
Tax paid at previous departure applicable to taxable period
Balance of tax (item 29 minus items 28 and 31)

Schedule A.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 7)

(a) Personal Exemption			(b) Credit for Dependents		
Status	Number of months during taxable period in each status	Credit claimed	Relationship	Number of months during taxable period	Credit claimed
Married and not living with husband or wife				Under 18 years old	
Living with husband or wife	6	1250.00		Over 18 years old	

Schedule B.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

(a) For Net Income of \$3,000, or less
(b) For Net Income in Excess of \$3,000
Earned net income (not over \$14,000)
Net income (line 20, Schedule C)
Earned income credit (10% of line 1 or 2, above, whichever amount is smaller, but do not enter less than \$300)

(COPY TO BE RETAINED BY TAXPAYER)

Total gross income**DEDUCTIONS (Not to be claimed by aliens in Class I)**Total deductions

neome (line 20 minus line 29)

AFFIDAVIT

I swear or affirm that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, pursuant to applicable revenue acts and the regulations issued thereunder.

bed and sworn to by, *T. Thayer*

me this... 21 ... day of June 1934

Las Financas

DEPUTY COLLECTOR

made by an agent must be accompanied by power of attorney.

If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

NOTICE OF TERMINATION OF TAXABLE PERIOD AND DEMAND FOR PAYMENT OF TAXES DUE

According to the provisions of section 148 of the Revenue Act of 1966, notice is hereby served on the individual(s) whose name(s) appear(s) on the reverse of this sheet, that the period of such individual(s) is declared terminated as of the date of departure from the United States, and demand is hereby made for the payment of the tax due for the period declared terminated and for the payment of any United States income taxes due the United States for prior years which have not been paid.

of above nature
by acknowledged

GUY T. HELVERING,
Chairman

CERTIFICATE OF COMPLIANCE

is certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax
 on with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of
 re indicated above, according to all information available to me at this date.

Collection of Internal Revenue or Internal Revenue Agent in Charge

Civil Office Liaison

JUN 21 1922

193

By

[Endorsed]: Case No. 3002-Y. Mertens vs. Rogan. Pltf. Exhibit 4 in Evidence. Date 3/30/44. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

* * * * *

Mr. Mitchell: May I see that exhibit for just a moment, your Honor, for purposes of the record, the one you have in your hand?

May the record show that the last exhibit offered by the plaintiffs contains the notice of termination of the taxable period and demand for payment of the tax, as well as the certificate of compliance which, under the rules and regulations, must be shown to the department of the government at the place of embarkation.

The Court: All right.

Mr. Zeitzius: I think the document will speak for itself and I do not wish to make any additional observations.

The Court: All right.

Mr. Zeitzius: May I next offer into evidence the photostatic copy of Form 1040C filed by Mr. Mertens on September 7, 1938, which the government counsel has agreed [19] to furnish.

The Clerk: Plaintiff's Exhibit 5.

Mr. Mitchell: Is this it?

Mr. Zeitzius: Yes. I understand that this will be marked Plaintiffs' Exhibit 5, the document I just referred to.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 5, and received in evidence.)

GROSS INCOMETotal gross income**DEDUCTIONS (Not to be claimed by aliens in Class I)**

Total deductions

Line 20 minus line 29)

AFFIDAVIT

I declare (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, pursuant to applicable revenue acts and the regulations issued thereunder.

ed and sworn to by

me this day of 193

SEP 6 - 1939 DEPUTY COLLECTOR

made by an agent must be acknowledged by power of attorney

NOTICE OF TERMINATION OF TAXABLE PERIOD AND DEMAND FOR PAYMENT OF TAXES DUE

and the period of such individual's tax liability is hereby terminated as of the date of departure from the United States, and demand is hereby made for the payment of the tax due for prior federal tax years and for the payment of any United States income taxes due the United States for prior years which have not been paid.

of above notice
by acknowledgment

GUY T. HELVERING,

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that the above-named individual has (have) satisfied all United States income, war-profits and excess-profits tax claims with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of distribution, as indicated above, according to all information available to me at this date.

1992-1993

SEP 6 - 1938

193



45

PRICE, WATERHOUSE & CO.

310 WEST SIXTH STREET

LOS ANGELES

September 7 1938

Collector of Internal Revenue,
939 South Broadway,
Los Angeles, California.

Dear Sir:

FERNAND MERTENS
VICTORINE CATHERINE REMOND MERTENS

There is enclosed a schedule showing the data for determining the income tax liability of Mr. and Mrs. Mertens to date of departure of Mr. Mertens, September 14 1938. It will be noted that the income from profession includes an item of \$40,017.41 entitled "1938 Federal income tax claimed by Collector of Internal Revenue to be 'constructively received' from Loew's Incorporated." This item represents the amount your office estimates is payable by Loew's Incorporated to Mr. and Mrs. Mertens on account of the contract of employment with the company.

It has been contended on behalf of the taxpayers that the amount payable by Loew's Incorporated cannot be determined until after the end of 1938 and should not be included in computing the taxable income of Mr. and Mrs. Mertens for 1938; however, your office has ruled that this amount must be included and the tax paid thereon before Mr. Mertens' sailing permit will be issued.

Yours very truly,

Price Waterhouse & Co.

Enclosure -
Schedule

(known, referred to as Ferdinand Gravat)

14 1938

1938 Federal old age benefits tax	\$120,000.00	
	<u>30.00</u>	\$120,030.00
1938 Fed. income tax, etc. -		
1938 Federal income tax	4,375.00	
1938 Federal income tax	4,592.06	
1938 California income tax	1,020.41	
1938 California unemployment insurance tax	88.08	
1938 Federal old age benefits tax	<u>30.00</u>	10,204.00
1938 Federal income tax claimed by Collector of Internal Revenue to be "constructively received" from Loew's Incorporated		<u>40,017.40</u>
		\$170,281.90
1938 - Business expenses:		
Commission paid agent	\$ 12,437.80	
Travel 50% of 1938.90	149.45	
Books and records for research	18.28	
Studio visit (salary 1479 - expenses mostly meals \$157.40)	581.40	
Light, make-up supplies, etc.	69.32	
Publicity	337.85	
Telephone calls to France on business	1,170.50	
Special set of teeth for picture "The Great Waltz"	250.00	
Bus - Green, Actors Guild	<u>75.00</u>	
Automobile expenses:		
Chauffeur's salary and meals	\$ 915.90	
Gas and oil \$130.86, parking, etc.	211.96	
Insurance - total for year commencing April 1938 \$10.71, one-half thereof	51.35	
Depreciation of Packard sedan at 25% per annum -		
Cost April 1938 <u>\$1,800</u>		
Depreciation for six months at 25%	<u>225.00</u>	
	<u>\$1,404.21</u>	
1938 - One-half thereof allocated to personal use	<u>702.10</u>	15,791.10
		\$154,480.40
Contribution:		
Amount paid hospital	\$ 10.00	
Loss:		
Federal telephone	5.30	
California income	88.08	
California unemployment insurance	<u>98.54</u>	201.92
Net income from sources within United States		\$154,288.48
Income from other sources:		
Rentals from flats in Paris -		
Rentals for 1938	34,000 francs	
Expenses for year	<u>3,400 francs</u>	
Net for year	<u>30,600 francs</u>	
Converted at \$.0273 (rate published in Wall Street Journal for August 18 1938) equals	<u>\$835.56</u>	
For eight and one-half months ending September 15 1938		<u>\$91.37</u>
Net income		\$154,380.40

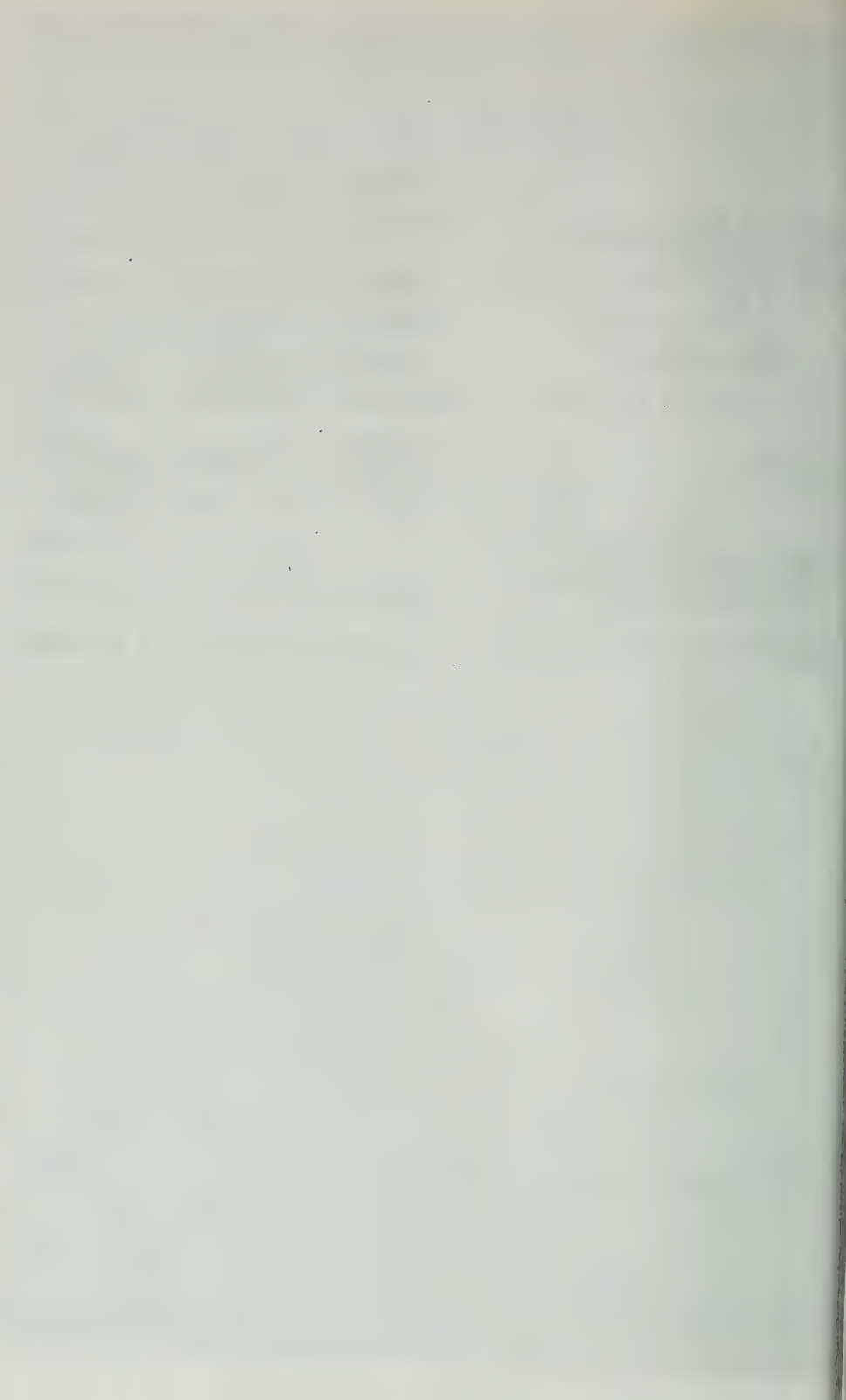
	<u>Mr. Mertens</u>	<u>Mrs. Mertens</u>	<u>Total</u>
Income as above	\$77,425.11	\$77,425.10	\$154,850.21
Credit for personal exemption - 8/12 of \$2,800	(833.34)	(833.33)	(1,666.67)
Credit for dependents - 8/12 of \$800	<u>(266.66)</u>	<u>(266.67)</u>	<u>(533.33)</u>
Surtax net income	\$76,325.11	\$76,325.10	\$152,650.21
Earned income credit	<u>1,400.00</u>	<u>1,400.00</u>	<u>2,800.00</u>
Normal tax net income	<u>\$74,925.11</u>	<u>\$74,925.10</u>	<u>\$149,850.21</u>
Normal tax	\$ 2,997.00	\$ 2,997.00	\$ 5,994.00
Surtax	<u>17,672.80</u>	<u>17,672.80</u>	<u>35,345.60</u>
	\$20,669.80	\$20,669.80	\$ 41,339.60
Amount previously paid		(3,245.92)	(3,245.92)
Amount withheld at source by Warner Bros. Pictures, Inc.	<u>(1,020.41)</u>		<u>(1,020.41)</u>
Amount payable to obtain sailing permit	<u>\$19,649.39</u>	<u>\$17,423.88</u>	<u>\$ 37,073.27</u>

Total by

Long Term

601.00

301.00
41,027.82
1,020.41
40,007.41



STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

J. R. White, acting on behalf of Messrs.
Price, Waterhouse & Co., 530 West Sixth Street, Los
Angeles, California, as advisor to Mr. and Mrs.
Fernand Mertens, affirms that he prepared the attached
statement on the basis of information furnished by
Mr. and Mrs. Mertens and Loew's Incorporated and that
to the best of his knowledge and belief the information
therein is true and correct although he does not know
of his own knowledge that all of the statements therein
are true and correct.

J. R. White

Subscribed and sworn to before me

this 6th day of September 1938.

Elsie C. C. C.

NOTARY PUBLIC in and for the County
of Los Angeles, State of California
My Commission Expires November 20, 1939.

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 5. Date 3/30/44. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

Mr. Zeitzius: I now wish to call the Court's attention to the fact that Plaintiffs' Exhibit 5 included as part thereof a photostat of a letter dated September 7, 1938, to the "Collector of Internal Revenue," by Price-Waterhouse & Co., together with the schedules and information referred to in that letter, consisting of two additional pages.

As Plaintiffs' Exhibit 6 I offer into evidence—

Mr. Mitchell: May I see that?

Mr. Zeitzius: --Form 1040C referred to in paragraph 9 of the stipulation.

Mr. Mitchell: The taxpayer's copy.

Mr. Zeitzius: Which is the taxpayer's copy of the document offered as Plaintiffs' Exhibit 5.

The Clerk: Plaintiffs' Exhibit 6.

(The document referred to was marked Plaintiffs' Exhibit 6, and received in evidence.)

30327
W/John
Alvando
4/78
France
Pro O

UNITED STATES
DEPARTING ALIEN INCOME TAX RETURN
For Taxable Period

Jan 1st 1978 and ended Sept 1st 1978
PRINT NAME AND HOME ADDRESS MAINLY BELOW
Ferdinand Merlens, Ferdinand Merlens
10425 Wiltshire Blvd
Westminster Calif
Belgium
540

Do not write in this space

Serial
Number

Amount
Paid

1914939
RECEIVED
WITH REMITTANCE

Check SEP 7 1978

COLL. INT. REV.
LOS ANGELES, CAL.

OCCUPATION

Are you a
citizen or subject?
resident?

2 Date on which you last
arrived in the United States

- Indicate block below to indicate alien status
- I. - Nonresident alien not engaged in trade or business within the United States and not having an office or place of business therein and having a gross income of not more than \$21,000 or no gross income received from sources within the United States, or resident of Canada (other than a citizen of the United States, not engaged in trade or business within the United States and not having an office or place of business therein).
 - II. - Nonresident alien (other than a resident of Canada, with no United States business or office and having a gross income of more than \$21,000 from sources within the United States).
 - III. - Resident alien.
 - IV. - Nonresident alien engaged in trade or business within the United States or having an office or place of business therein.
- Income tax returns of the United States; give the following information for the past 3 years:

Not in USA
459207
600 Calif
District in which return was filed

COMPUTATION OF TAX

Aliens in Class I

(Line 20, Schedule C)
(10% of item 1) (5% of item 1 if resident of Canada)
Tax paid at source
paid at previous departure applicable to taxable period

Aliens in Class II

Aliens in Classes III and IV

(Line 20, Schedule C)	20 Net income (line 20, Schedule C)
Personal exemption	21 Less Personal exemption
Credit for dependents	22 Credit for dependents
Surplus net income	23 Balance (surplus net income)
Less interest on U.S. obligations, etc. reported in Schedule C	24 Less interest on U.S. obligations, etc. reported in Schedule C
Earned income credit	25 Earned income credit
Subject to normal tax	26 Balance subject to normal tax
(4% of item 12)	27 Normal tax (4% of item 26)
Surplus on item 22	28 Surplus on item 22
Item 15, or 14, or 10% of line 20, Schedule C, whichever	29 T. 1 tax (items 7 and 28)
Tax paid at source	30 Tax paid at previous departure applicable to taxable period
paid at previous departure applicable to taxable period	31 Tax paid at previous departure applicable to taxable period
Tax (item 16 minus items 17 and 18)	32 Balance of tax (item 20 minus items 30 and 31)

Schedule A. EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See instruction 7)

(a) Personal Exemption

(b) Credit for Dependents

Status	Number of months during taxable period in such status	Credit claimed	Name of dependent and relationship	Number of months during taxable period	Credit claimed
Married and not living with husband or wife	8	833 34	My Family	72	833 66
Living with husband or wife				months	

Schedule B. COMPUTATION OF EARNED INCOME CREDIT. (See instruction 7)

(a) For Net Income of \$3,000 or less

(b) For Net Income in Excess of \$3,000

(Line 20, Schedule C)	1 Earned net income, not over \$1,000
Earned income credit (10% of line 1, above)	2 Net income (line 20, Schedule C)
	3 Earned income credit (10% of line 2, above, whichever amount is smaller, but not enter less than \$90)

(COPY TO BE RETAINED BY TAXPAYER)

CROSS INCOME

Total gross income

7742911

DEDUCTIONS (Not to be claimed by others in Class D)

[illegible]

Total deductions

Net income (line 20 minus line 29)

7542-11

AFFIDAVIT

I/We swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, pursuant to the applicable revenue acts and the regulations issued thereunder.

described and sworn to by

Therefore this

SEP 6 - 1946

DEPUTY COL

If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

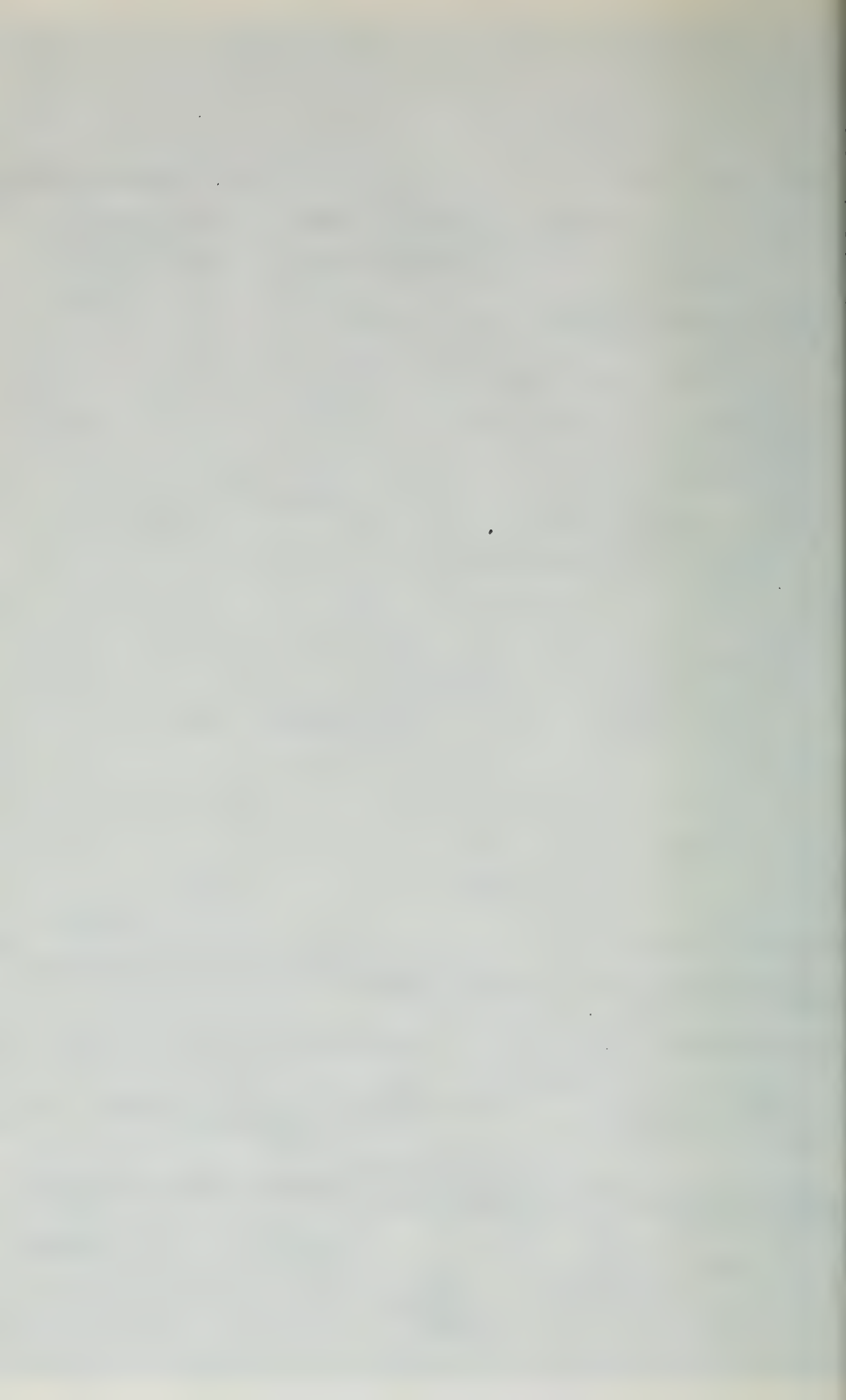
CERTIFICATE OF COMPLIANCE

This certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax obligations with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of departure indicated above, according to all information available to me at this date.

SEP 6 - 1938



By



[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit No. 6 in Evidence. Date 3/30/44.. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

Mr. Zeitzius: As Plaintiffs' Exhibit 7 I offer the original copy of Form 1040C filed on September 7, 1938, by [20] Mr. Mertens.

The Clerk: A photostat, Plaintiffs' Exhibit 7.

(The document referred to was marked Plaintiffs' Exhibit 7, and received in evidence.)

GROSS INCOME

and gross income[illegible]

AFFIDAVIT

and sworn to by

X B Dg Am
Signature and title of officer administering oath.

de by an agent must be accompanied by power of attorney.

CERTIFICATE OF COMPLIANCE

certifies that the above-named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of indicated above, according to all information available to me at this date.

(Colleges of Internal Revenue to Internal Revenue Agents and Clerks)

By

1999

Figure 1

2-16397



I, Victorine Catherine Renourd Mertens, residing at 10425 Wilshire Boulevard, Beverly Hills, California, being unable by reason of continuous absence from the United States since June 29 1938 to make the income tax return required to be filed by me for the taxable year 1938, have made, constituted and appointed, and, by these presents, do make, constitute and appoint my husband, Fernand Mertens, a resident of the United States, whose address is 10425 Wilshire Boulevard, Beverly Hills, California, my true and lawful attorney for me and in my name, place and stead, to execute and to file the income tax return required by any Act or Acts of Congress to be made by me for the taxable year 1938.

Victorine Catherine Renourd Mertens

Dated at Los Angeles
this 26 day of June 1938.

Executed in presence of:

Acknowledged before me this
_____ day of _____ 1938.

(Title)

*adm. Mertens nie
denks Renourd Victor*

*Le xiptare
Gumblaus*

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltfs. Exhibit 7. Date 3/30/44. No. 7 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J Somers, Deputy Clerk.

Mr. Zeitzius: I next offer into evidence taxpayer's copy, in photostatic form, of Form 1040C, filed by Mrs. Mertens on September 7, 1938.

Mr. Mitchell: May the record show that Exhibits 6 and 8 also contain the certificate of compliance as well as the Commissioner's determination or termination of taxable period?

Mr. Zeitzius: We ask that the return should speak for itself.

The Court: He merely is calling the Court's attention to the contents, that is all. Whatever is in the certificate speaks for itself.

Mr. Zeitzius: Yes. I want to call attention to the fact that—

The Court: The legal effect of it is a different proposition.

Mr. Zeitzius: We find that these three returns are signed by the taxpayer and there is no receipt of acknowledgment by it of the taxpayer. I call attention to that fact. It may or may not be significant in the light of the evidence which will develop.

The Court: I don't know what you mean. Each of them [21] swore to the affidavit.

Mr. Zeitzius: You will notice, your Honor, that I am calling attention to the fact there is fine print requiring the acknowledgment by the taxpayer. I do not know at the moment that this is going to be important. However, as long as Mr. Mitchell called your attention to it, I also wanted to call attention to that fact.

Mr. Mitchell: If the Court please, these two documents, I think the record should certainly show, in the light of what counsel says, were furnished by plaintiffs and not by the government.

Mr. Zeitzius: That is right.

Mr. Mitchell: Because the government has no copy of them.

Mr. Zeitzius: That is correct.

Mr. Mitchell: If there is any question about them having been delivered to the taxpayers, then I will object to their admission.

Mr. Zeitzius: No; we do not question that those are true copies of the papers delivered to the taxpayers.

The Court: I see. All right.

(The document referred to was marked Plaintiffs' Exhibit 8, and received in evidence.)

Department

(FORM 1040C)
(Revised Feb. 1959)

Internal Revenue Service

Do not write in this space

60293
New York
November
6/29/58
Furner
CWC

UNITED STATES DEPARTING ALIEN INCOME TAX RETURN

For Taxable Period

beginning Jan 1st 1958 and ended Sept 1st 1958

NAME, NAME AND HOME ADDRESSES PLAINLY BELOW

Walter H. Walters (husband)
10425 Matshus Blvd
Westwood, Calif

OCCUPATION

Housewife

Serial
NumberAmount
Paid, \$

(Cashier's stamp)

RECEIVED
WITH REMITTANCE

Examined
By SEP 2 1958
COLL. INT. REV.
LOS ANGELES OFFICE
O. C. B.

the country are you a

citizen or subject
resident?

2 Date on which you last
arrived in the United States

the appropriate block below to indicate alien status

Class I Nonresident alien not engaged in trade or business within the United States and not having an office or place of business therein and not more than \$21,000 (or no gross income) received from sources within the United States or resident of Canada (other than a citizen of the United States) not engaged in trade or business within the United States and not having an office or place of business therein

Class II Nonresident alien (other than a resident of Canada) with no United States business or office and having a gross income of more than \$21,000 from sources within the United States

Class III Resident alien

Class IV Nonresident alien engaged in trade or business within the United States or having an office or place of business therein

Class V Nonresident alien engaged in trade or business within the United States or having an office or place of business therein

Taxable income reported

Tax paid

District in which return was filed

Not in U.S.A.
5498445 459207

the following line and proceeding with respect to your United States income tax liability for any taxable year or part of other than the taxable period covered by this return.

of your knowledge and belief

COMPUTATION OF TAX

Aliens in Class I

Schedule C

ability of the alien or resident of Canada.

Income tax paid at source

Tax paid at present departure applicable to taxable period

Total tax (line 21 plus tax items 22-24)

Aliens in Class II

Schedule C

Personal exemption

Credit for dependents

Balance (surplus) net income

Interest on U.S. obligations

Earned income credit

Tax subject to normal tax

Total tax (4% of item 12)

Total tax on item 9

Total tax on items 13 and 14

Total tax (item 14, or 10% of line 20, whichever is greater)

Income tax paid at source

Tax paid at present departure

Total tax (line 21 plus tax items 22-24)

Aliens in Classes III and IV

20 Net income (line 20, Schedule C)

21 Less: Personal exemption

22 Credit for dependents

23 Balance (surplus) net income

24 Less: Interest on U.S. obligations, etc., reported in Schedule C

25 Earned income credit

26 Normal tax (4% of item 20)

27 Normal tax (4% of item 20)

28 Surplus item 21

29 Total tax (items 26 and 28)

30 Less: Income tax paid at source

31 Tax paid at present departure

32 Total tax (line 29 plus tax items 30 and 31)

Schedule A. EXPLANATION OF CREDITS CLAIMED IN ITEMS 7, 8, 21, AND 22. (See Instruction 7)

a) Personal Exemption

b) Credit for Dependents

status	Number of dependents claimed	Name of dependent and relationship	Number of months during taxable period	Credit claimed
			Under 14 years old	Over 14 years old
	8	Walter H. Walters	76	286 67
	33	Annouard		

Schedule B. COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 7)

a) For Net Income of \$1,000 or less

b) For Net Income in Excess of \$1,000

Schedule C

Earned income credit

Net income (line 20, Schedule C)

Total tax (line 29, Schedule C)

Total tax (line 29, Schedule C)

COPY TO BE RETAINED BY TAXPAYER

2-10037

Schedule C - TAXABLE INCOME COMPUTATION

GROSS INCOME

1. Taxpayer's name
and address

2. Nature of income (such as salary, wages, interest, dividends, rent, etc.)

3. Amount of United States income tax withheld at source

4. Gross amount of income

Name Bros Pictures

2 Weeks due. 1/2 net

of husband

Fernand Matheu (Gros)

7942510

Schedule attached to original
showing all deductions
balance reported by husband

Total gross income

DEDUCTIONS (Not to be claimed by aliens in Class I)

1. To whom paid
(Name and address)

2. Nature of deduction (such as interest, taxes, contributions, etc.)

3. Amount of deduction

Total deductions

Net income (line 20 minus line 29)

AFFIDAVIT

We swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable period stated, pursuant to applicable revenue acts and the regulations issued thereunder.

Subscribed and sworn to by

For me the

day of

DEPUTY COLLECTOR

If this is a joint return (not made by an agent) it must be signed by both husband and wife and sworn to before a proper officer by the spouse preparing the return, or if neither or both prepare the return then by both spouses.

NOTICE OF TERMINATION OF TAXABLE PERIOD AND DEMAND FOR PAYMENT OF TAXES DUE

According to the provisions of section 140 of the Revenue Act of 1936, notice is hereby served on the individual(s) whose name(s) appear(s) on the reverse of this sheet, that the taxable period of such individual(s) is declared terminated as of the date of departure from the United States, and demand is hereby made for the payment of the tax due for the taxable period declared terminated and for the payment of any United States income taxes due the United States for prior years which have not been paid.

If of above notice
has been acknowledged.

Signature of taxpayer(s)

ROY T. HELVERING,
Commissioner

CERTIFICATE OF COMPLIANCE

This certifies that the above named individual(s) has (have) satisfied all United States income, war-profits, and excess-profits tax returns with respect to income received or to be received, determined as nearly as may be, up to and including the intended date of departure indicated above, according to all information available to me at this date.

Chief Office Deputy

SEP 7 - 1938

1938



By

Collector of Internal Revenue or Internal Revenue Agent in Charge

[Endorsed]: Case No. 3002. Pltf. Exhibit No. 8 in Evidence. Date 3/30/44. Clerk, U. S. District Court. Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

Mr. Zeitzius: Referring now to paragraph—oh, I want to make a correction. The four returns, or, rather, the four last documents offered, are all returns filed [22] September 7, 1938. They are referred to in paragraph 11 of the stipulation and not paragraph 9 as I have stated.

The Court: All right.

Mr. Zeitzius: Paragraph 12 of the stipulation states that the refund claims filed on March 5, 1940, will be offered into evidence. I therefore offer into evidence as Plaintiffs' Exhibit 9 the photostatic copy furnished by the government of the claim for refund filed by Mr. Mertens, which is a photostat of the original refund claim as filed, together with the supporting schedules attached thereto.

The Court: It may be received as 9.

(The document referred to was marked Plaintiffs' Exhibit 9, and received in evidence.)

[PLAINTIFFS' EXHIBIT 9]

United States [Crest] of America

[Written]: Claim

TREASURY DEPARTMENT

Washington

July 22, 1943

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of \$9,199.65 income tax for 1938 (with statement, schedules and affidavit attached) filed by F. Mertens (Fernand Mertens) c/o Loew's Incorporated, Culver City, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

F. A. Birgfeld

F. A. Birgfeld

Chief Clerk, Treasury Department. [91]

Form 645
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June 1939

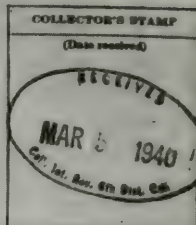
CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

AUG 23 1940

- ☒ REFUND OF TAX ILLEGALLY COLLECTED.
☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).



STATE OF California 500007-1939 List
COUNTY OF Los Angeles REPUBLIC OF FRANCE, CITY OF PARIS
CONSULATE GENERAL OF THE UNITED STATES OF AMERICA }
Sept. 261-1938 List

Name of taxpayer or purchaser of stamps Fernand Martens
Business address c/o Loew's Incorporated
10202 Washington Boulevard, Culver City, California
Residence _____

TYPE
OR
PRINT

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

District in which return (if any) was filed Sixth California
Period of for income tax, make separate form for each taxable year from January 1, 1938 to December 31, 1938
Character of assessment or tax Federal income tax
Amount of assessment, \$20,669.80; dates of payment Sept. 7 1938 \$19,649.39 withheld \$1,020.41
Date stamps were purchased from the Government _____
Amount to be refunded, OR such amount as is legally refundable \$ 9,199.65
Amount to be abated (not applicable to income or estate taxes) _____
The time within which this claim may be legally filed expires, under Section _____ of the Revenue Act of 19____
on _____, 19____

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached



(Attach letter-size sheets if space is not sufficient)

Subscribed and sworn to before me this

Signed

1939

[Signature]

Notary Public for the State of California

SEE INSTRUCTIONS ON REVERSE SIDE

Vice Consul of the United States
of America at Paris, France

U. S. GOVERNMENT PRINTING OFFICE 16-11704

(Plaintiffs' Exhibit 9)

Fernand Mertens (known professionally as Fernand Gravet) entered into a contract with Loew's Incorporated for his services in a motion picture "The Great Waltz." Under the terms of the contract Mr. Mertens was to be paid \$120,000 and the company agreed to reimburse him for any Federal income taxes lawfully assessed because of his earnings from "The Great Waltz." For the purpose of determining taxpayer's income tax liability at the date of departure of Mr. Mertens, September 14, 1938, information was filed with the Collector of Internal Revenue at Los Angeles showing community net income for the period of \$113,938.37. The Collector's office was informed of the terms of Mr. Mertens' contract with Loew's Incorporated and it was explained that no obligation existed under the contract to reimburse Mr. Mertens for the taxes until after the close of the calendar year 1938 because it was impossible to determine the amount of Federal income taxes on the income involved until after the close of the taxable period.

The Collector's office however considered as income "constructively received" in 1938 an amount of \$40,017.41 representing the amount the Collector's office estimated would be payable by Loew's Incorporated to Mr. and Mrs. Mertens as reimbursement for Federal income taxes under the terms of the contract. It is contended that this amount was not "constructively received" in 1938 and should be excluded in computing taxpayer's income for that year.

There are attached (1) three schedules showing the income and deductions of Mr. and Mrs. Mertens for the year 1938; (2) a reconciliation of the net income shown by these schedules with the net income shown by the

(Plaintiffs' Exhibit 9)

data filed with the Collector of Internal Revenue to obtain a compliance certificate (sailing permit) to date of Mr. Mertens' departure from the United States, September 14, 1938 and (3) computations of indicated overassessments.

Claim is hereby made for refund of the indicated overassessments with interest as provided by law. [94]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS 1938 INCOME TAX RETURNS

Summary of Income and Deductions

	<u>Total</u>	<u>Reported by</u>	
		<u>Husband</u>	<u>Wife</u>
<u>Income</u>			
<u>(schedules attached)</u>			
Salaries and other compensation for personal services	\$114,691.77	\$57,345.89	\$57,345.88
Rents	473.40	236.70	236.70
Loss from farm	(15.78)	(7.89)	(7.89)
Total income	\$115,149.39	\$57,574.70	\$57,574.69
<u>Deductions</u>			
<u>(schedules attached)</u>			
Contributions	\$ 10.00	\$ 5.00	\$ 5.00
Taxes	1,404.22	702.11	702.11
Total deductions	\$ 1,414.22	\$ 707.11	\$ 707.11

(Plaintiffs' Exhibit 9)

Net income for

Federal returns	\$113,735.17	\$56,867.59	\$56,867.58
-----------------	--------------	-------------	-------------

Add—California in-

come tax	88.08	44.04	44.04
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Net income for

California returns	\$113,823.25	\$56,911.63	\$56,911.62
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[95]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNS

Income

Salaries and other compensation for personal services:

Loew's Incorporated, Culver City, California—

Salary	\$120,000.00
--------	--------------

1938 California unemployment insurance taxes	1,212.30
--	----------

1938 Federal old age benefits tax	30.00
-----------------------------------	-------

\$121,242.30

Warner Bros. Pictures, Inc., Burbank, California—

Salary	\$ 4,375.00
--------	-------------

(Plaintiffs' Exhibit 9)

Federal old age benefits tax	30.00	
1938 California unemployment insurance taxes	98.54	
1937 Federal income tax	4,592.06	
1938 Federal income tax	1,020.41	
1938 California income tax	88.08	
		<hr/>
		10,204.09
		<hr/>
		\$131,446.39

Less—Business expenses:

Commission paid agent	\$ 12,437.50
Wardrobe—50% of \$298.90	149.45
Books and records for research	18.28
Studio valet (salary \$479— expenses, mostly meals, \$102.40)	581.40
Gratuities to studio employees	119.28
Wigs, make-up supplies, etc.	69.32
Publicity	337.55
Telephone calls to France on business	1,170.50
Dental and skin treatments, including \$250 for special set of teeth for picture, “The Great Waltz”	1,025.15
Dues, Screen Actors Guild	75.00

(Plaintiffs' Exhibit 9)

Automobile expenses:

Chauffeur's salary
and meals \$ 915.90

Gas and oil \$188.66,
parking, etc.
\$23.30 211.96

Insurance—total for
year commencing
April 1938 \$102.71,
nine-twelfths thereof 77.03

Depreciation of Pack-
ard sedan at 25%
per annum—

Cost, April
1938 \$1,800.00

Depreciation for
nine months 337.50

\$1,542.39

Less—One-half thereof
allocated to personal
use

771.19

16,754.62

\$114,691.77

[96]

(Plaintiffs' Exhibit 9)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOUD MERTENS

1938 INCOME TAX RETURNS

Rents:

Rentals from flats in Paris 25,000 francs

Expenses for year 7,000 francs

 Net income for year 18,000 francs

Converted at \$.0263 (rate

at December 31 1938,

I. T. 3247) equals

\$ 473.40

Loss from Farm:

Farm income 10,200 francs

Expenses for year 10,800 francs

 Net loss for year (600) francs

Converted at \$.0263 as above

\$ (15.78)

Deductions

Contribution—

Mt. Sinai Hospital

\$ 10.00

Taxes:

California unemployment insurance taxes \$1,310.84

Federal tax on telephone messages 5.30

 Total for California income tax return \$1,316.14

(Plaintiffs' Exhibit 9)

<u>Add</u> —California income tax	88.08
-----------------------------------	-------

Total for Federal income tax return	\$1,404.22
-------------------------------------	------------

[97]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOUD MERTENS

1938 CALIFORNIA INCOME TAX RETURNS

Reconciliation of net income reported in attached returns with data filed with Collector of Internal Revenue at Los Angeles for purpose of obtaining compliance certificate (sailing permit) to date of departure of Fernand Mertens from the United States, September 14 1938.

Net income for Federal return, per attached schedule	\$113,735.17
--	--------------

1938 Federal income tax claimed by Collector of Internal Revenue to be "constructively received" from Loew's Incorporated	40,017.41
---	-----------

Gratuities to studio employees	119.28
--------------------------------	--------

Dental and skin treatments	775.15
----------------------------	--------

Additional automobile expenses:

Insurance	\$ 25.68
-----------	----------

Depreciation	112.50
--------------	--------

	\$138.18
--	----------

(Plaintiffs' Exhibit 9)

Less—One-half thereof allo-		
cated to personal use	69.09	
	<hr/>	69.09
Adjustment of rents:		
Per data filed with Collector	\$591.73	
Per attached schedules	473.40	
	<hr/>	118.33
Loss from farm		15.78
		<hr/>
Net income per data filed with Collector of Internal Revenue		\$154,850.21
		=====
		[98]

FERNAND MERTENS
VICTORINE CATHERINE RENOURD MERTENS
1938 FEDERAL INCOME TAXES

Computation of Indicated Overassessments

	Mr. <u>Mertens</u>	Mrs. <u>Mertens</u>
Net income per attached schedule	\$56,867.59	\$56,867.58
Personal exemption	(850.00)	(1,650.00)
Credit for dependents	(800.00)	
	<hr/>	<hr/>
Surtax net income	\$55,217.59	\$55,217.58
Earned income credit	1,400.00	1,400.00
	<hr/>	<hr/>
Normal tax net income	\$53,817.59	\$53,817.58
	=====	=====
Surtax	\$ 9,317.45	\$ 9,317.45
Normal tax	2,152.70	2,152.70
	<hr/>	<hr/>

(Plaintiffs' Exhibit 9)

Total tax	\$11,470.15	\$11,470.15
Previously paid or withheld at source	20,669.80	20,669.80
	<hr/>	<hr/>
Indicated overassessments	\$ 9,199.65	\$ 9,199.65
	<hr/>	<hr/>

[99]

State of California)
) ss
County of Los Angeles)

J. R. White, acting on behalf of Messrs. Price, Waterhouse & Co., 530 West Sixth Street, Los Angeles, California, as advisor to Fernand Mertens, affirms that he prepared the attached claim for refund showing over-assessment of Federal income taxes for 1938 in the amount of \$9,199.65 and that to the best of his knowledge and belief the statements therein are true and correct, although he does not know of his own knowledge that all of the statements therein are true and correct.

J. R. White
J. R. White

Subscribed and sworn to before me this 2nd day of May 1939.

[Seal]

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires November 20, 1939

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Ptf. Exhibit 9. Date 3/30/44. No. 9 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [100]

Mr. Zeitzius: Your Honor may be interested in reading the third page which relates to the grounds.

The Court: All right; I will look at that.

Mr. Zeitzius: As Plaintiffs' Exhibit 10—

Mr. Mitchell: Does counsel want the wife's claim to be introduced?

Mr. Zeitzius: Yes, please. The Plaintiffs offer into evidence the photostatic copy of the original of the claim for refund referred to in the stipulation, filed by Mrs. Mertens on March 5, 1940, together with the attached schedules and papers.

The Clerk: 10.

(The document referred to was marked Plaintiffs' Exhibit 10 and received in evidence.) [23]

[PLAINTIFFS' EXHIBIT 10]

United States [Crest] of America

[Written]: Claim

TREASURY DEPARTMENT

Washington

July 22, 1943

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of \$9,199.65 Income Tax for 1938 (with affidavit, statement and schedules attached), filed by Victorine Catherine Renourd Mertens c/o Loew's Incorporated, Culver City, fornia, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

F. A. Birgfeld

F. A. Birgfeld

Chief Clerk, Treasury Department [101]

Form 422
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June 1939

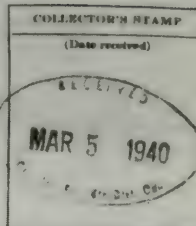
CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ REFUND OF TAX ILLEGALLY COLLECTED.
☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF California July 246-1938 List
COUNTY OF Los Angeles Sept. 260-1938 List
REPUBLIC OF FRANCE CITY OF PARIS



TYPE
OR
PRINT

Name of taxpayer or purchaser of stamps Victorine Catherine Renouard Mertens
c/o Loew's Incorporated
Business address 10202 Washington Boulevard, Culver City, California
(Street) (City) (State)
Residence _____

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named and that the facts given below are true and complete:

District in which return (if any) was filed Sixth California
Period (if for income tax, make separate form for each taxable year) from January 1, 1938 to December 31, 1938
Character of assessment or tax Federal income tax
Amount of assessment, \$20,669.80; dates of payment June 28 1938, Sept. 7 1938
Date stamps were purchased from the Government _____
Amount to be refunded OR such amount as is legally refundable \$9,199.65
Amount to be abated (not applicable to income or estate taxes) _____
The time within which this claim may be legally filed expires, under Section _____ of the Revenue Act of 19____ on _____, 19____.

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached

(Attach letter when abatement is given in not on return)

Sworn to and subscribed before me this

Signed

10th day of June 1937

Victorine Catherine Renouard Mertens

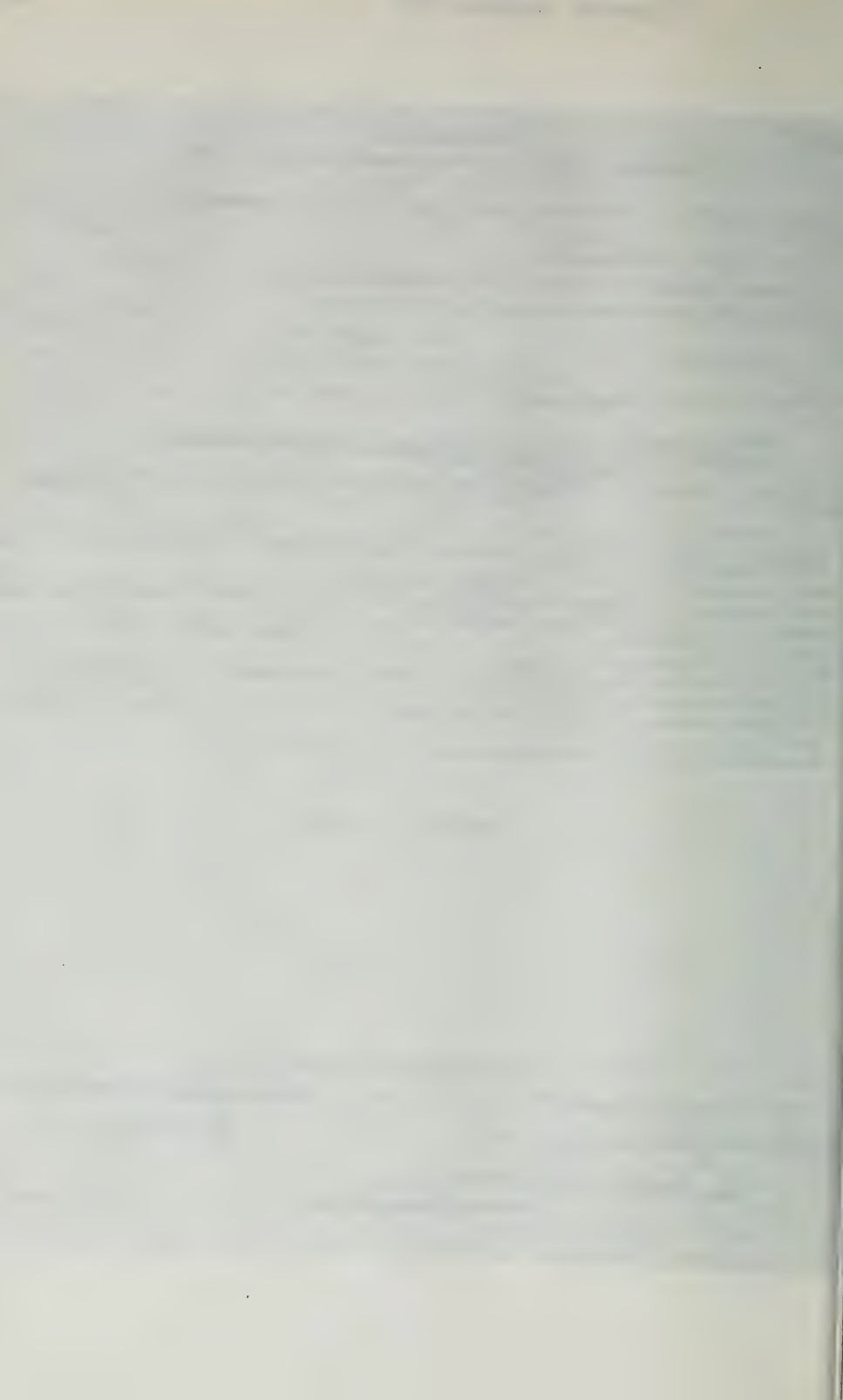
(Signature of officer administering oath)

JOHN R. WOOD

(Title)

(SEE INSTRUCTIONS ON REVERSE SIDE)

Vice-Consul of the French States
of America at Paris, FRANCE



CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	ACCOUNT NO. OR		Amount assessed	PAID, ASSESSD, OR CREDITED		Pd. Ab. Cr.
				Page	Line		Date	Amount	
1040-C						\$		\$	
1-1-'38	IT	1938	July	246-		3,245 92	6/21/'38	3,245 92	Pd
6-30-'38									
1040-C									
1-1-'38	IT	1938	Sept.	260		17,423 88	9/7/'38	17,423 88	Pd
2-1-'38									
Total,						\$ 20,669 80	Total,	\$ 20,669 80	

I certify that the records of this office show the following facts as to the purchase of stamps:

[illegible]

Collector of Internal Revenue.

6th California
(District)

COMMITTEE ON CLAIMS

Claim examined by--

Claim approved by--

Chief of Division.

Amount claimed... \$.....

Amount allowed... \$.....

Amount rejected... \$.....

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Collector of the exact basis thereof.
2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

(Plaintiffs' Exhibit 10)

State of California)
) ss
County of Los Angeles)

J. R. White, acting on behalf of Messrs. Price, Waterhouse & Co., 530 West Sixth Street, Los Angeles, California, as advisor to Victorine Catherine Renourd Mertens, affirms that he prepared the attached claim for refund showing overassessment of Federal income taxes for 1938 in the amount of \$9,199.65 and that to the best of his knowledge and believe the statements therein are true and correct, although he does not know of his own knowledge that all of the statements therein are true and correct.

J. R. White

J. R. White

Subscribed and sworn to before me this 2nd day of May 1939.

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires November 20, 1939 [104]

Fernand Mertens (known professionally as Fernand Gravet) entered into a contract with Loew's Incorporated for his services in a motion picture "The Great Waltz." Under the terms of the contract Mr. Mertens was to be paid \$120,000 and the company agreed to reimburse him for any Federal income taxes lawfully assessed because of his earnings from "The Great Waltz." For the purpose of determining taxpayer's income tax liability at the date of departure of Mr. Mertens, September 14

(Plaintiffs' Exhibit 10)

1938, information was filed with the Collector of Internal Revenue at Los Angeles showing community net income for the period of \$113,938.37. The Collector's office was informed of the terms of Mr. Mertens' contract with Loew's Incorporated and it was explained that no obligation existed under the contract to reimburse Mr. Mertens for the taxes until after the close of the calendar year 1938 because it was impossible to determine the amount of Federal income taxes on the income involved until after the close of the taxable period.

The Collector's office however considered as income "constructively received" in 1938 an amount of \$40,017.41 representing the amount the Collector's office estimated would be payable by Loew's Incorporated to Mr. and Mrs. Mertens as reimbursement for Federal income taxes under the terms of the contract. It is contended that this amount was not "constructively received" in 1938 and should be excluded in computing taxpayer's income for that year.

There are attached (1) three schedules showing the income and deductions of Mr. and Mrs. Mertens for the year 1938; (2) a reconciliation of the net income shown by these schedules with the net income shown by the data filed with the Collector of Internal Revenue to obtain a compliance certificate (sailing permit) to date of Mr. Mertens' departure from the United States, September 14 1938 and (3) computations of indicated overassessments.

Claim is hereby made for refund of the indicated over-assessments with interest as provided by law. [105]

(Plaintiffs' Exhibit 10)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNS

Summary of Income and Deductions

		<u>Reported by</u>	
	<u>Total</u>	<u>Husband</u>	<u>Wife</u>
<u>Income</u>			
(schedules attached)			
Salaries and other compensation for personal services	\$114,691.77	\$57,345.89	\$57,345.88
Rents	473.40	236.70	236.70
Loss from farm	(15.78)	(7.89)	(7.89)
	<hr/>	<hr/>	<hr/>
Total income	\$115,149.39	\$57,574.70	\$57,574.69
	<hr/>	<hr/>	<hr/>
<u>Deductions</u>			
(schedules attached)			
Contributions	\$ 10.00	\$ 5.00	\$ 5.00
Taxes	1,404.22	702.11	702.11
	<hr/>	<hr/>	<hr/>
Total deductions	\$ 1,414.22	\$ 707.11	\$ 707.11
	<hr/>	<hr/>	<hr/>
Net income for Federal returns	\$113,735.17	\$56,867.59	\$56,867.58
Add—California income tax	88.08	44.04	44.04
	<hr/>	<hr/>	<hr/>
Net income for California returns	\$113,823.25	\$56,911.63	\$56,911.62
	<hr/>	<hr/>	<hr/>

(Plaintiffs' Exhibit 10)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNSIncomeSalaries and other compensation
for personal services:Loew's Incorporated, Culver
City, California—

Salary \$120,000.00

1938 California unem-
ployment insurance

taxes 1,212.30

1938 Federal old age

benefits tax 30.00

\$121,242.30Warner Bros. Pictures, Inc.,
Burbank, California—

Salary \$ 4,375.00

Federal old age benefits

tax 30.00

1938 California unem-
ployment insurance

taxes 98.54

1937 Federal income

tax 4,592.06

1938 Federal income

tax 1,020.41

(Plaintiffs' Exhibit 10)

1938 California income
tax

88.08

10,204.09

\$131,446.39

Less—Business expenses:

Commission paid agent \$ 12,437.50

Wardrobe—50% of \$298.90 149.45

Books and records for re-
search 18.28

Studio valet (salary \$479—
expenses, mostly meals,
\$102.40) 581.40

Gratuities to studio employees 119.28

Wigs, make-up supplies, etc. 69.32

Publicity 337.55

Telephone calls to France on
business 1,170.50

Dental and skin treatments, in-
cluding \$250 for special set
of teeth for picture, "The
Great Waltz" 1,025.15

Dues, Screen Actors Guild 75.00

Automobile expenses:

Chauffeur's salary
and meals \$ 915.90

Gas and oil \$188.66,
parking, etc.. \$23.30 211.96

(Plaintiffs' Exhibit 10)

Insurance—total for
 year commencing
 April 1938 \$102.71,
 nine-twelfths thereof 77.03

Depreciation of Pack-
 ard sedan at 25%
 per annum—

Cost, April
 1938 \$1,800.00

Depreciation for
 nine months 337.50

\$1,542.39

Less—One-half thereof
 allocated to personal
 use

771.19

16,754.62

\$114,691.77

=====

[107]

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VIVTORINE CATHERINE RENOURD MERTENS

1938 INCOME TAX RETURNS

Rents:

Rentals from flats in Paris 25,000 francs

Expenses for year 7,000 francs

(Plaintiffs' Exhibit 10)

Net income for year	18,000 francs
---------------------	---------------

=====

Converted at \$.0263 (rate at December 31 1938, I. T. 3247) equals	
--	--

\$ 473.40

=====

Loss from Farm:

Farm income	10,200 francs
-------------	---------------

Expenses for year	10,800 francs
-------------------	---------------

=====

Net loss for year	(600) francs
-------------------	--------------

=====

Converted at \$.0263 as above	
-------------------------------	--

\$ (15.78)

=====

Deductions

Contribution—

Mt. Sinai Hospital	
--------------------	--

\$ 10.00

=====

Taxes:

California unemployment insurance taxes	\$1,310.84
---	------------

Federal tax on telephone messages	5.30
-----------------------------------	------

=====

Total for California income tax return	\$1,316.14
--	------------

<u>Add</u> —California income tax	88.08
-----------------------------------	-------

=====

Total for Federal income tax return	\$1,404.22
-------------------------------------	------------

=====

[108]

(Plaintiffs' Exhibit 10)

FERNAND MERTENS

(Known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

1938 CALIFORNIA INCOME TAX RETURNS

Reconciliation of net income reported in attached returns with data filed with Collector of Internal Revenue at Los Angeles for purpose of obtaining compliance certificate (sailing permit) to date of departure of Fernand Mertens from the United States, September 14 1938.

Net income for Federal return, per attached schedule		\$113,735.17
1938 Federal income tax claimed by Collector of Internal Revenue to be "constructively received" from Loew's Incorporated		40,017.41
Gratuities to studio employees		119.28
Dental and skin treatments		775.15
Additional automobile expenses:		
Insurance	\$ 25.68	
Depreciation	112.50	
	<hr/>	
	\$138.18	
<u>Less</u> —One-half thereof allocated to personal use	69.09	
	<hr/>	
		69.09
Adjustment of rents:		
Per data filed with Collector	\$591.73	
Per attached schedules	473.40	
	<hr/>	
		118.33
Loss from farm		15.78
		<hr/>

(Plaintiffs' Exhibit 10)

Net income per data filed with Collector of Internal Revenue	\$154,850.21
	=====
	[109]

FERNAND MERTENS
VICTORINE CATHERINE RENOURD MERTENS
1938 FEDERAL INCOME TAXES
Computation of Indicated Overassessments

	Mr. Mertens	Mrs. Mertens
Net income per attached schedule	\$56,867.59	\$56,867.58
Personal exemption	(850.00)	(1,650.00)
Credit for dependents	(800.00)	
	-----	-----
Surtax net income	\$55,217.59	\$55,217.58
Earned income credit	1,400.00	1,400.00
	-----	-----
Normal tax net income	\$53,817.59	\$53,817.58
	=====	=====
Surtax	\$ 9,317.45	\$ 9,317.45
Normal tax	2,152.70	2,152.70
	-----	-----
Total tax	\$11,470.15	\$11,470.15
Previously paid or withheld at source	20,669.80	20,669.80
	-----	-----
Indicated overassessments	\$ 9,199.65	\$ 9,199.65
	=====	=====

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Pltf. Exhibit 10. Date 3/30/44. No. 10 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [110]

Mr. Zeitzius: All right. I shall offer at this time, with the request that we be permitted to withdraw them to make copies or photostats—

The Court: All right.

Mr. Zeitzius: —as one batch, entitled Plaintiffs' Exhibit 11, consisting of the following documents: A, the original letter of November 8, 1940, to the Plaintiff Mertens, Fernand Mertens, from Internal Revenue Agent in Charge, Sullivan, together with the enclosure referred to therein as the "report of the examination" of his income tax return.

The Court: All right.

Mr. Zeitzius: B, a similar letter, with a similar report, addressed to Mrs. Mertens, plaintiff, by the acting internal revenue agent in charge, Sullivan;

C, a letter addressed to Mr. and Mrs. Mertens by [25] Internal Revenue Agent in charge, Martin, dated December 9, 1940;

D, a letter dated February 5, 1941, addressed to Mrs. Mertens by Internal Revenue Agent in Charge, Martin;

E, a similar letter of the same date, addressed to Mr. Mertens by Internal Revenue Agent in Charge, Martin;

F, I think is next, a letter dated February 26, 1941, addressed to Mr. J. R. White, who is referred to in the powers of attorney attached to the stipulation of facts, signed by the head of the technical staff of the Pacific Division of the Office of the Commissioner of Internal Revenue;

G, the next letter, letter of October 17, 1940, addressed to Mr. and Mrs. Mertens.

The Clerk: Is that '40?

Mr. Zeitzius: 1940, signed by the Acting Internal Revenue Agent in charge, Sullivan.

Mr. Mitchell: The defendant has no objection to—by the way, defendant Widow Rogan has no objection to these documents that are just offered, but does not concede the correctness of all of the legal and factual conclusions contained therein.

The Court: All right.

(The documents referred to were marked Plaintiffs' Exhibit 11, and received in evidence.) [26]

[PLAINTIFFS' EXHIBIT 11]

NOTICE

This Is a Copy of the Report of the Examiner of Your Income Tax Return. It Is an Important Document and Should Be Carefully Preserved.

[Crest]

Office of
Internal Revenue Agent in Charge
Los Angeles Division
Phone: MADison 7411.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse
Los Angeles, Calif.

October 17, 1940.

[Stamped]: Referred to JRW No. 66128 Received
Oct 18 1940 Answered JRW 10/22/40 Passed for Filing W

Mr. Fernand Mertens,
Mrs. Victorine Mertens,
c/o Price Waterhouse & Co.,
530 West 6th Street,
Los Angeles, California.

(Plaintiffs' Exhibit 11)

In re: 1938 Income Tax.

Attention: Mr. White.

Sir and Madam:

Reference is made to the 1938 income tax returns and to claims for refund.

The claims are based on the statement that the Collector's office erroneously considered as income "constructively received" in 1938 the amount of \$40,017.41, representing estimated Federal Income Taxes payable by Loew's Incorporated to taxpayers under the terms of a contract.

The statement is made that no obligation existed under the contract to reimburse Mr. Mertens for the taxes until after the close of the calendar year 1938 because it was impossible to determine the amount of Federal taxes on the income until after the close of the taxable period.

From the information attached to the return, it appears that all salary items due to the taxpayers were paid prior to September 14, 1938, date of their departure for France and that at the time of filing the Forms 1040-C, the exact amount of income received and deductions allowable were known so that the tax computed on the return appears to be correct. The amount of the tax demanded by the Collector was loaned by *Lowe's Inc.* and paid by Mr. Mertens.

This office holds, therefore, that the amount of \$40,017.41 advanced to taxpayer is properly includable as income since it was definitely received in the taxable year.

(Plaintiffs' Exhibit 11)

The returns will be recommended for acceptance as filed and the claims will be recommended for disallowance.

Your reply should be forwarded for the attention of Mrs. Flint.

Respectfully,

R. B. Sullivan

Acting Internal Revenue Agent in Charge.

LDF/mhf. [110]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

IT:R

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Twelfth Floor,

U. S. Post Office and Courthouse,

Los Angeles, California.

Nov 8 1940

[Stamped]: Referred to JRW No. 66129 Received
Nov 9 1940 Answered JRW 11/12/40 Passed for
Filing

Mr. Fernand Mertens,
c/o Price, Waterhouse & Co.,
530 West Sixth Street,
Los Angeles, California.

Sir:

I enclose a copy of the report of the examination of your income tax returns for the year 1938, in connection with

(Plaintiffs' Exhibit 11)

your claim for a refund of \$9,199.65. The report, which has been carefully reviewed by this office, discloses no grounds for reduction of your tax liability.

If You Agree to the conclusions expressed in the report, please so advise this office at your earliest convenience.

If You Do Not Agree to these conclusions, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you. This office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to file with this office within the 30-day period mentioned either an acceptance of the conclusions expressed in the report or a written protest, a recommendation will be made to the Commissioner of Internal Revenue that your claim be disallowed.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

R. B. Sullivan

Acting Internal Revenue Agent in Charge.

Enclosures:

Report of examination.

Form of acknowledgment.

AL [111]

(Plaintiffs' Exhibit 11)

Name	Fernand Mertens	Year	1938
Net Income disclosed by return			\$77,425.11
Add: Deduct:			
No change		\$	

Taxpayer's claim is based on the statement that amount advanced by Loew's, Inc., to pay the income tax on 1938 income was not constructively received in 1938.

The claim is recommended for disallowance on the grounds that the amount of \$40,017.41 advanced to taxpayer in 1938 is income for that year since it appears the correct tax was computed on the return filed on September 7, 1938, prior to departure for France.

Net Income as adjusted		\$77,425.11
Less: Personal Exemption	\$ 833.34	
Credit for Dependents	266.66	1,100.00
		<hr/>
Balance, surtax net income		\$76,325.11
Less: Interest on Liberty bonds, etc.	\$	
Earned income credit		
(10% of \$14,000.00)	1,400.00	1,400.00
		<hr/>
Balance, subject to normal tax		\$74,925.11
Normal tax at 4% on \$74,925.11	\$ 2,997.00	
Surtax on \$76,325.11	17,672.80	\$20,669.80
		<hr/>
Total tax		\$20,669.80
(Withheld by Warner Bros. Pictures)		

(Plaintiffs' Exhibit 11)

Less: Income tax paid at source	\$ 1,020.41
Income tax. foreign country	1,020.41
	<hr/>
Tax liability as adjusted	\$19,649.39
Tax previously assessed: Original	\$19,649.39
Subsequent: List	
Overassessment allowed	19,649.39
	<hr/>
Additional tax—Overassessment	\$ None
Date of report: October 23, 1940	

L. D. Flint

Internal Revenue Auditor

8-AK

AL [112]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

IT:R

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICETwelfth Floor,
U. S. Post Office and Courthouse,
Los Angeles, California.

Nov 8 1940

[Stamped]: Referred to JRW No. 66128 Received
Nov 9 1940 Answered JRW 11/12/40 Passed for Fil-
ing

(Plaintiffs' Exhibit 11)

Mrs. Victorine Mertens,
c/o Price, Waterhouse & Co.,
530 West Sixth Street,
Los Angeles, California.

Madam:

I enclose a copy of the report of the examination of your income tax returns for the year 1938, in connection with your claim for a refund of \$9,199.65. The report, which has been carefully reviewed by this office, discloses no grounds for reduction of your tax liability.

If You Agree to the conclusions expressed in the report, please so advise this office at your earliest convenience.

If You Do Not Agree to these conclusions, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you. This office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to file with this office within the 30-day period mentioned either an acceptance of the conclusions expressed in the report or a written protest, a recommendation will be made to the Commissioner of Internal Revenue that your claim be disallowed.

(Plaintiffs' Exhibit 11)

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,

R. B. Sullivan

Acting Internal Revenue Agent in Charge.

Enclosures:

Report of examination.

Form of acknowledgment.

AL [113]

Name	Victorine Mertens	Year	1938	
Net Income disclosed by return				\$77,425.10
Add: Deduct:				
No change		\$		
See explanation on report for Fernand Mertens.				
It is recommended that the claim be disallowed.				
Net Income as adjusted				\$77,425.10
Less: Personal Exemption	\$	833.33		
Credit for Dependents		266.67		1,100.00
				<hr/>
Balance, surtax net income				\$76,325.10
Less: Interest on Liberty bonds, etc.	\$			
Earned income credit				
(10% of \$14,000.00)		1,400.00		1,400.00
				<hr/>
Balance, subject to normal tax				\$74,925.10
Normal tax at 4% on \$74,925.10	\$	2,997.00		

(Plaintiffs' Exhibit 11)

Surtax on \$76,325.10	17,672.80	
	<hr/>	
Total tax		\$20,669.80
Less: Income tax paid at source \$ 3,245.92		
Income tax, foreign country		3,245.92
		<hr/>
Tax liability as adjusted		\$17,423.88
Tax previously assessed: Original \$17,423.88		
Subsequent: List		
Overassessment allowed		<u>17,423.88</u>
Additional tax or Overassessment		\$ None
Date of report: October 23, 1940		

L. D. Flint

Internal Revenue Auditor

8-AK AL [114]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:Conf.

DC:FC

Telephone—MAdison 7411

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse

Los Angeles, Calif.

December 9, 1940.

[Stamped]: Referred to JRW No. 66684 Received
Dec 10 1940 Answered ✓ JRW Passed for Filing W
Mr. Fernand Mertens,

(Plaintiffs' Exhibit 11)

Mrs. Victorine Catherine Renourd Mertens,
c/o Mr. J. R. White,
530 West Sixth Street,
Los Angeles, California.

Year: 1938

(1-1 to 6-30 & 1-1 to 9-1)

Sir and Madam:

Your protest against the findings of an investigation of your income tax liability for the period above indicated has been referred to the Conference Section of this office for further consideration, since a basis for agreement has not been reached with the representative of the Bureau with whom you have heretofore discussed the proposed adjustments.

In order that you may discuss with the conferee the issues in question, an oral hearing has been set for 10:00 A. M., December 17, 1940, on the 12th floor, U. S. Post Office and Court House, Los Angeles, California.

There are no formalities governing the appearance for conference of taxpayers or full time employees, but any attorney or other representative appearing for or accompanying a taxpayer must present a power-of-attorney authorizing him to act in the matter. Also, any such representative cannot be recognized unless he is enrolled to practice before the Treasury Department in accordance with the provisions of Treasury Department Circular No. 230, and present either a permanent or temporary enrollment card.

In order to assure a full consideration of the issues involved without unnecessary delay, it is urged that you present, at or before the conference, all of the evidence upon which you intend to rely.

When communicating with this office regarding the foregoing, ask for Mr. A. L. Crandall, and when appearing for conference, please present this letter at the Information Desk.

Respectfully,

George D. Martin
Internal Revenue Agent in Charge.

TEC:IA
2-A [115]

[Crest]

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:Conf.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse
Los Angeles, Calif.

February 5, 1941

[Stamped]: Referred to JRW No. 67647 Received
Feb 6 1941 Answered ✓ JRW Passed for Filing W
Mrs. Victorine Mertens,
c/o Mr. J. R. White,
Room 820,
530 West Sixth Street,
Los Angeles, California.

Madam:

Your protest dated December 4, 1940 against the adjustments proposed by this office in your income tax liability for the year 1938, as set forth in my letter of November 8, 1940, has been carefully considered but

(Plaintiffs' Exhibit 11)

appears to furnish no grounds for a modification of the proposed adjustments.

In accordance with your request the file is being referred to the Pacific Division of the Technical Staff for hearing. That office will advise you further in the matter.

Respectfully,

George D. Martin

Internal Revenue Agent in Charge.

TEC:EES [116]

[Crest]

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:Conf.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

Twelfth Floor, U. S. Post Office and Courthouse

Los Angeles, Calif.

February 5, 1941

[Stamped]: Referred to JRW No. 67648 Received
Feb 6 1941 Answered ✓ JRW Passed for Filing W
Mr. Fernand Mertens,
c/o Mr. J. R. White,
Room 820, 530 West Sixth Street,
Los Angeles, California.

Sir:

Your protest dated December 4, 1940 against the adjustments proposed by this office in your income tax liability for the year 1938, as set forth in my letter of

(Plaintiffs' Exhibit 11)

November 8, 1940, has been carefully considered but appears to furnish no grounds for a modification of the proposed adjustments.

In accordance with your request the file is being referred to the Pacific Division of the Technical Staff for hearing. That office will advise you further in the matter.

Respectfully,

George D. Martin

Internal Revenue Agent in Charge.

TEC:EES [117]

[Crest]

Office of

Commissioner of Internal Revenue

Address Reply to
Head, Pacific Division, Technical Staff
and Refer to
C-TS:PD
LA:AMS

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Pacific Division, Technical Staff
1714 U. S. Post Office & Court House
Los Angeles, Calif.
Feb 26 1941

[Stamped]: Referred to JRW No. 68008 Received Feb 27 1941 Answered JRW 3/1/41 Passed for Filing W

(Plaintiffs' Exhibit 11)

Mr. J. R. White, Room 820,
530 West 6th Street
Los Angeles, California

In re: Fernard Mertens,
Victorine C. R. Mertens,
Los Angeles, California.

Year: 1938.

Sir:

The administrative files in the income tax cases of the above-named taxpayers for the year indicated have been referred to this office for consideration pursuant to your request filed with the office of the Internal Revenue Agent in Charge at Los Angeles, California.

In response to your request a conference has been arranged for 2:00 o'clock, March 4, 1941, to be held at 1714 U. S. Post Office and Court House, Los Angeles, California. At this conference you will be afforded an opportunity to present in an informal manner the facts, arguments, or legal authority in support of your contentions. If practicable, any additional matter not previously submitted should be filed with the Staff at least two days prior to the conference. However, if you intend to rely on new or additional facts of a material nature not heretofore considered by the Internal Revenue Agent in Charge, it may be deemed necessary to return the files to the Revenue Agent in Charge for his consideration.

If for any reason you will be unable to appear for conference on the date fixed above, please advise this office

(Plaintiffs' Exhibit 11)

immediately upon receipt of this letter, stating the nearest date or dates on which you will be able to appear. In your reply please refer to the symbols TS:AMS.

Respectfully,

Virgil Bean

T

Virgil Bean

Head, Pacific Division

Technical Staff

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Pltfs. Exhibit 11. Date 3/30/44 No. 11 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. L. J.
Somers, Deputy Clerk. [118]

Mr. Zeitzius: Plaintiffs offer as Exhibit No. 12 the Price-Waterhouse copy of a letter dated December 28, 1938, requesting certain information for use in connection with the 1938 tax liability of the plaintiffs, together with the reply thereto dated January 11, 1939; and we ask permission to withdraw for photostating the carbon copy of Exhibit 12.

The Court: All right. The two documents will be admitted.

The Clerk: Marked Plaintiffs' Exhibit 12.

(The documents referred to were marked Plaintiffs' Exhibit 12, and received in evidence.)

[PLAINTIFFS' EXHIBIT 12]

PRICE, WATERHOUSE & CO.

530 West Sixth Street

LOS ANGELES

December 28 1938

[Stamped]: Signed Copy

[Stamped]: F. L. H. Dec 29 1938

Air Mail

Mr. Fernand Mertens,

2 Rue de Buzennal,

St. Cloud, France.

Dear Sir:

1938 United States and

California Income Tax Returns

At the time we assisted you in determining your United States income taxes in order that you might obtain a sailing permit last September, we explained that it would be necessary to file completed Federal returns

(Plaintiffs' Exhibit 12)

covering the whole of the year 1938. It will be necessary, of course, also to file California income tax returns for 1938. You will recall that Loew's Incorporated advanced to you the amounts necessary for you to obtain your sailing permit, these advances being in the nature of a loan until such time as the definite amount of tax is finally determined.

In order for us to prepare for you and Mrs. Mertens completed returns for the year 1938, it will be necessary for you to furnish us with statements of the 1938 income and expenses of your Paris apartments and of the 1938 operations of your farm and stables so that any profit or loss from these ventures may be included in the completed returns.

Also please inform us of your intentions relative to returning to the United States during 1939, as this will be important in determining the basis on which your returns should be filed, particularly in deciding whether tax liabilities should be determined as resident or non-resident aliens of the United States.

Whether you intend to return to the United States during 1939 may have a material effect upon the amount of your income tax liability. As we explained to you before you left the United States, there has probably already been an over-payment of tax, in which case it will be advisable to file claims for refund of a portion of the tax which you paid when obtaining sailing permits. Our present plan is to forward to you for signature the necessary refund claims at the same time the completed United States and California income tax returns [123] Mr. Fernand Mertens -2- December 28 1938 are forwarded to you for signature, although we will not

(Plaintiffs' Exhibit 12)

file the refund claims until your plans for 1939 are definitely known to us. Please let us know if you have any questions regarding the procedure.

As the completed United States returns will have to be filed by March 15 1939, we would appreciate receiving the information requested as soon as possible. Since we are not certain that you are still at the above address, we will appreciate your informing us as soon as you receive this letter.

Yours very truly,

Price, Waterhouse & Co.

Copy for—

Messrs. Loeb and Loeb

Two copies for—

Loew's Incorporated✓ [124]

2. RUE DE BUZENVAL

SAINT-CLOUD, S. & O.

Tel. Auteuil 29-53

To Price-Waterhouse Co.

530 West 6th Street

Los Angeles, Calif.

January 11th, 1939.

Gentlemen:

Well received your letter dated December 28, 1938. Will you please find below the informations you are willing to have.

Sincerely yours,

Fernand Gravet

(Plaintiffs' Exhibit 12)

1938 Income

Income:

Rent on 2 apartments
situated in Paris . .
25,000 francs.

Expenses:

Charges concerning heat,
taxes, etc. . .
7,000 francs
25,000
7,000

18,000

Eighteen thousand francs

Concerning the farm:

There is a deficit of six hundred francs (600 francs)
planned as follows:

Income: ten thousand
two hundred francs.
(10,200 francs)

Expenses: ten thousand
eight hundred francs.
(8,200 francs)

Up to now I do intend to come back to the United States
in 1939.

Hoping that you wil find these informations satis-
factory, I remain

Sincerely yours,

Fernand Gravet

The total French income for my wife and me in 1938 is
Seventeen Thousand Francs (17,000 francs).

[Endorsed]: Case No. 3302. Mertens vs. Rogan.
Pltf. Exhibit 12. Date 3/30/44. No. 12 in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. L. J.
Somers, Deputy Clerk. [122]

Mr. Mitchell: Defendant waives the objection that the documents are self-serving; that merely goes to the weight, perhaps, of the evidence. But let the record show that the government does not concede the correctness of the statements of either fact or legal conclusions contained therein.

The Court: I think that is understood, that the agents cannot bind you, much less can the taxpayer bind you, by talking back to the agent. [27]

* * * * *

Mr. Zeitzius: What I would like to do is withdraw the original of the letter of January 11, 1939, and substitute this photostat, and then for the Court's easier reading purposes I hand a copy of our transcription of that letter, of which I have already given counsel a copy.

The Court: All right. Just attach it to the exhibit, Mr. Somers, and I can use whichever is more legible. [28]

* * * * *

Mr. Mitchell: Returning for the moment to Plaintiffs' Exhibit 12 that has just been introduced into evidence, I would like very much to see the envelope in which came the letter dated January 11th from the Plaintiff Mertens to Price-Waterhouse & Co., if it is available. I would like [29] to have it produced at this time.

Mr. Zeitzius: No; I have never seen it, and my understanding is that Loew's received it before Price-Waterhouse.

Mr. Mitchell: It is addressed to "Price-Waterhouse & Co."

Mr. Zeitzius: I know it is.

Mr. Mitchell: Then, will counsel stipulate that the letter was received within 30 days after the date it bears by either Loew's or Price-Waterhouse?

Mr. Zeitzius: Yes.

* * * * *

Mr. Mitchell: And it was received by them within a month after the date it bears.

Mr. Zeitzius: Yes; or a copy of it.

Mr. Mitchell: Either that or a copy of it.

Mr. Zeitzius: That is right.

Mr. Mitchell: Very well.

Mr. Zeitzius: Mr. White, take the stand, please. [30]

J. R. WHITE,

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: J. R. White.

Direct Examination

By Mr. Zeitzius:

Q. Your name is J. R. White?

A. That is correct.

Q. Where do you reside?

A. I live in Glendale, California.

Q. What is your occupation?

A. I am a partner in the firm of Price-Waterhouse & Co., certified public accountants.

Q. And for how long have you been in that capacity?

A. Since July 1st, last. Prior to that time I was the manager in the Los Angeles office of Price-Water-

(Testimony of J. R. White)

house. Since 1935 and for the—and before that, since 1926, I was a junior and senior accountant in that office.

Q. Are you a certified public accountant?

A. I am.

Q. By the Court: Licensed in the State of California, Mr. White? A. Yes, sir.

Q. By Mr. Zeitzius: You were so licensed during 1938? A. Yes, sir. [31]

Q. And ever since? A. Yes, sir.

Q. Are you acquainted with Mr. and Mrs. Mertens, the plaintiffs in this case?

A. I have met them; yes.

Q. Please state when you met Mrs. Mertens, and where?

A. I met Mrs. Mertens in the office of the collector of internal revenue at 939 South Broadway, Los Angeles. I believe it was on June 21, 1938.

Q. Who were present at that time?

A. At that time there was Mrs. Mertens, I believe Mr. Mertens was there, Mrs. Ad Schulberg who was Mr. Mertens' agent, Mr. John Melbourne, an employee of Lowe's Incorporated, Mr. McDonald of the collector's office—we met in front of his desk—and part of the time Mr. Ogden of the collector's office.

Q. Is that Deputy Collector James H. McDonald?

A. I don't recall the initials, but I believe that that is the deputy collector.

Q. Was it the same Mr. McDonald who is in the courtroom? A. Yes; it is.

Q. What was the occasion of you appearing with these people at that time on June 21, 1938?

(Testimony of J. R. White)

A. About ten days prior to that time Mr. Levi of Messrs. Loeb & Loeb called on the telephone and asked if [32] Price-Waterhouse would assist Mr. and Mrs. Mertens in obtaining their compliance certificate and paying the income tax so that they could get a sailing permit. He explained to us that they were here under a contract by which they were to make a picture for a producer, Mervyn LeRoy, I believe the name was, which had been taken over by Loew's; and that under the terms of this contract that—

* * * * *

The Witness: And would we assist in obtaining the sailing permits and prepare the information; and we agreed to do so.

Q. By Mr. Zeitzius: Tell us what happened on June 21st before Mr. McDonald and Mr. Ogden, one or both of them, whoever were present at the time; please state what occurred at that time.

A. We were all introduced and previously I had received certain information as to the amounts of salary paid up to the date of departure, paid to Mr. Mertens up to the date of departure, and the other amounts of income. We presented that income to Mr. McDonald and those items, [33] and computed the tax.

Q. Did you present it in writing, the information, to Mr. McDonald?

A. It was presented informally in writing. We had it in our work sheets, and at that time only Mrs. Mertens was obtaining a sailing permit. The salary had been earned by—we were informed that the salary had been earned by Mr. Mertens, and so we did not present the information to him formally in writing, is my recollection.

(Testimony of J. R. White)

Q. I would like to hand to you what has been marked Plaintiffs' Exhibit 3 and ask you whether you recognize page 3 of the exhibit 3?

A. Yes; I do.

Q. Is that the information you submitted to Mr. McDonald, deputy collector?

A. Yes. I was incorrect in my other statement that it was only in the working papers, because it is typed information which we submitted and I recognize my affidavit on the bottom of it.

Q. You swore to the affidavit and that is the information?

A. In Mr. McDonald's presence; yes, sir.

Q. Did Mrs. Mertens exhibit a passport?

A. Yes. Mrs. Mertens had her passport and exhibited it. She also had a quota number, a certificate of—I have forgotten the exact shape or form of it, but she— [34]

* * * * *

Mr. Mitchell: If there is such a document, your Honor, if there is a passport, it seems to me that passport would be the best evidence.

The Court: I take judicial notice. In the first place, she exhibited not a United States passport; she exhibited a French passport because she, being a native of France, had a French passport. She exhibited a quota [35] number. I take judicial notice of the fact that quota numbers are given, unless a person comes in on what has been known as a visitor's passport or on a presidential non-quota visa. Quotas are fixed by the consul or his representatives in the foreign country, and the person who has

(Testimony of J. R. White)

that cannot surrender it because it is the sole authority for coming into the United States and departing therefrom legally. [36]

* * * * *

A. The conversation developed as to—I think I asked the question of the Collector's Office as to whether Mrs. Mertens had to report and pay tax on half of Mr. Mertens' income before she could get her compliance certificate. This same question had come up in another case with the same deputy collector several months before and was quite keenly in my line at the time. Mr. McDonald, is my recollection, said that since most taxpayers were in the United States under quota numbers, they were regarded as resident aliens, having the status as resident aliens and were residents of California, therefore that Mrs. Mertens would have to pay tax on one half the income to the date of departure before she could get out of the country.

So, on the basis of the information which had been compiled beforehand, the tax was computed and the forms were [37] signed; and then we went down to another window, the cashier's window in the Collector's Office, and Mr. Melbourne, I believe, paid the tax, and that, I think, completed the transactions on that day at the Collector's Office.

Mr. Zeitzius: Before asking you further questions on that conversation, I hand you a paper which I will have marked for identification as Plaintiffs' Exhibit.

The Clerk: 13.

Mr. Zeitzius: 13.

(The document referred to was marked Plaintiffs' Exhibit No. 13, for identification.)

(Testimony of J. R. White)

Q. And ask you—

Mr. Mitchell: May I see the document, Mr. Zeitzius, that you mentioned?

Mr. Zeitzius: Yes, surely.

Q. —whether you recognize this paper which has been marked for identification as Plaintiffs' Exhibit 13?

Mr. Mitchell: We will stipulate that that was issued at the time and delivered to someone.

Mr. Zeitzius: All right. I offer into evidence as Plaintiffs' Exhibit 13 the document identified as No. 13.

The Court: All right.

Mr. Mitchell: What is the date of that, please?

Mr. Zeitzius: For the Court's information I hand you my own personal retained photostated copy. [38]

(The document referred to was marked Plaintiffs' Exhibit No. 13, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 13]

COLLECTOR OF INTERNAL REVENUE,

Los Angeles, California,

Taxpayer's Receipt for Income Tax for the Year 1937.

1040 C to June 30—1938

Cash

Check

Victoria Mertens Gravet

Amount Paid \$3245 92

[Stamped]: Received With Remittance Jun 21 1938
Col. Int. Rev. Los Angeles, Cal. O. G. S.

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Pltf. Exhibit 13. No. 13 Identification. Date 3/30/44.
No. 13 in Evidence. Clerk, U. S. District Court, Sou.
Dist. of Calif. LJS, Deputy Clerk. [125]

(Testimony of J. R. White)

Q. By Mr. Zeitzius: Did Mrs. Mertens have any United States income for the purpose of this return or at the time of the return June, 1938, about which we were talking?

A. My recollection is that at that time her only United States income was her community, one half of Mr. Mertens' so-called salary, or income of Mr. Mertens.

* * * * *

The Court: Oh, Exhibit 3. I notice that in Exhibit 8 she does state on the reverse of the blank that the amount reported is half of the husband's earnings. [39]

The Witness: Maybe I should explain that all of the information upon which we prepared this return was obtained without independent verification by us. In other words, we prepared the information which we were given.

The Court: There is no objection to you stating what was said at the time, but the objection to the previous answer was that you were stating a conclusion, not what was said at the time either by Mrs. Gravet or yourself as one of the four parties present on behalf of the taxpayers. That is the only objection, Mr. White.

The Witness: I should put it, then, I was informed that the only income Mrs. Gravet had in the United States was her community one-half of the income.

Q. By the Court: And that was so stated at the time?

A. And that was so stated at the time.

The Court: All right.

Q. By Mr. Mitchell: By whom?

(Testimony of J. R. White)

A. By Mr. Gravet, by Mrs. Gravet, and by the people at Loew's, and in the telephone conversation with the people from Warner Brothers.

Mr. Mitchell: I still move that all that portion of the answer to what they said about it being community property be also stricken as a conclusion of the plaintiff and hearsay as to anyone else, what anyone else said.

The Court: No. I think the portion relating to what [40] was verified on the telephone may be stricken; but I will allow the statements that were made to the agent at that time during the discussion to remain.

Q. By Mr. Zeitzius: Did she state whether or not she had any income from sources outside the United States in this conversation in June?

A. Yes. They informed me that they had some income from an apartment in Paris, I believe it was, and also that they operated a farm in France as a business venture from which they had either a profit or a loss. They did not know at that time whether they had a profit or a loss, at least, they told me they did not know at that time.

Q. Are the figures shown on page 3 of Plaintiffs' Exhibit 3 the figures with respect to the French income estimated as of June in 1938?

A. That is right. Mr. Mertens told me that the flats in Paris would bring in 34,000 francs for the year 1938; and from that information I computed the rent for six months by conversion at the published exchange rates in The Wall Street Journal as of June 30.

Mr. Zeitzius: That is the black exhibit, your Honor, exhibit 3, page 3.

The Court: Which one is that one?

(Testimony of J. R. White)

Mr. Zeitzius: The black exhibit 3, page 3.

The amount of French income is shown here, is it?

A. It is 34,000 francs. [41]

Q. No. I mean in American dollars.

A. That would be \$948.18 for the full year, and for the six months, the amount of \$474.09 was included in this computation.

Q. Was anything asked by the deputy collector with respect to the place of marriage of the individuals, of the plaintiffs?

Mr. Mitchell: Excuse me. What was that question?
(The question was read.)

A. I do not recall whether that was asked by the deputy collector or not.

Q. By Mr. Zeitzius: Was anything said about or in the presence of the deputy collector concerning where they were married? A. Yes. I—

Mr. Mitchell: By whom?

Mr. Zeitzius: By any of the parties in the presence of the deputy collector and in the presence of either of the plaintiffs.

A. Yes. I reported to the deputy collector that Mr. Mertens was a citizen of Belgium, or a subject of Belgium, Mrs. Mertens was a citizen of France; and that I had been told by them that they were married in France.

Q. Were Mr. and Mrs. Mertens present when you stated to the deputy collector that you had been told by them?

A. Yes; they were present at all times on this [42] occasion on the visit to the office.

(Testimony of J. R. White)

Q. Was anything said with respect to the community property goods law or community goods law either of France or Belgium?

A. Yes. Mr. McDonald and I and Mr. Ogden had some discussion about the fact that we would not have to get a—

Mr. Mitchell: Just a moment. I move that the whole conversation be testified to rather than the conclusions.

The Court: He is doing it. Go ahead, state it. State what was said rather than your conclusions.

A. That we would not have to worry about whether or not they had been married under the community goods law of France or not.

Mr. Mitchell: Who said this?

A. Well, Mr. McDonald and Mr. Ogden and I had this discussion, the reason being that on this previous case I referred to, before they would let these other people who were non resident aliens out they had to get a wire from Washington recognizing the community of goods law of France before they would let these other people out of the country. And on this case we discussed that we would not have to get such a ruling because of the fact that these people were in the United States under a quota number, and therefore we would not have to worry about whether the law under which they were married was community property law, although they both stated that they were married under a community property law. [43]

* * * * *

Q. By Mr. Zeitzius: Was there anything said by Mr. or Mrs. Mertens on June 21, 1938, as to what her

(Testimony of J. R. White)

plans were for the future so far as coming back to the United States or not coming back is concerned?

* * * * *

A. I only say Mrs. Mertens on one day.

Q. And that is the conversation we are talking about?

A. On June 21, and the whole time I saw her was in the Collector's Office.

The Court: All right; go ahead, then.

A. And at that time she stated in the presence of all of us who were there, except possibly Mr. Ogden was not there at the time, that she was going back to France and [49] that she expected to return in three or four months.

Q. By the Court: Ogden was not there because, you know, you said one or the other kept coming in and going out.

A. That is right.

Q. Is that the idea?

A. That is right. We started with Mr. McDonald and then we did—

Q. By the way, how long did the conference last, several hours?

A. It was probably about two hours.

Q. Two hours. A. In the morning.

The Court: All right.

Q. By Mr. Zeitzius: Was anything said by you or on behalf of the plaintiffs at that time to the effect that she did not have to report any income?

A. Well, I think I discussed that with Mr. McDonald purely as a theoretical matter; and they said, "No; as long as she is"—he said, "As long as she is a resident and regarded as a resident of California, we won't give her the permit unless she pays tax on half of the income."

(Testimony of J. R. White)

Q. Was anything said by either deputy collector to the effect that she was a resident alien?

A. Well, yes. The deputy collector's office said that under the—told us that under the rule, that when they were [50] in the—

Mr. Mitchell: I would like to have the person who made that statement there.

The Court: Who made that statement, Mr. McDonald or Mr. Ogden?

A. Mr. McDonald told us that it was the rule of the Treasury Department, the collector's office, that when a person was in under a quota number and unless there was some extenuating circumstance, they were regarded as residents; and that, as a resident, she would have to report on half the income.

Q. By Mr. Zeitzius: Did there come a time when you thereafter had occasion again to go to the Collector's Office on behalf, this time, of Mr. Mertins?

A. I went to the Collector's Office on several occasions after that. Towards the end of August, and finally on September 7, in 1938. The reasons for these visits were that Mr. Mertens could not leave when Mrs. Mertens did because he had not completed his picture, and in the interim I visited him and obtained from him information to complete the tax data that was required at the time he was going to leave. This information was finally gotten together about, I imagine, the 25th or 26th of August, at which time Mr. Leon Levi of Loeb and Loeb and I went down to the Collector's Office and presented this information to Mr. McDonald and Mr. Ogden and discussed it with them. They took parts of the [51] information and went upstairs, and said they wanted to go and talk with

(Testimony of J. R. White)

the internal revenue agent's office about it. After some length they came back and told us they had discussed it with Mr. Maddux, who was one of the chiefs of the office of the internal revenue agent in charge, and that the compliance certificate would not be issued exactly on the basis of the information that we had presented.

Then we had further discussion with them and found out on what basis they would issue the compliance certificate; and then we made arrangements to call on September 7th and pay the tax and obtain the compliance certificate.

Q. When you went there did you say you went there on August 30, 1938, or did you say the latter part of August?

A. Well, we were first there about August 25 or 26.

Q. And then when did you next return after the 25th or 26th of August?

A. Then we went down on August 30th.

Q. On August 30th you say Mr. Levi was present and Mr. McDonald?

A. Mr. Levi was present, Mr. McDonald, and Mr. Ogden; and we were with Mr. McDonald and Mr. Ogden together for a few minutes, but most of that time we were with Mr. Ogden.

Q. On that occasion neither of the plaintiffs were present, is that correct? A. That is correct.

Q. Please state what occurred in that conversation.
[52] Oh, before asking you that, at that time did you hold a power of attorney from Mr. and Mrs. Mertens, referred to as Exhibits A and B to the stipulation of facts?

(Testimony of J. R. White)

A. Yes; I had power of attorney from both of them, dated the 24th of June.

Q. You appeared pursuant to that power of attorney, did you, on behalf of Mr. and Mrs. Mertens on August 30th? A. Yes.

Q. In that connection I ask you to examine what has been marked Plaintiffs' Exhibit 5 and kindly state whether the schedule of figures attached thereto—well, do you know where that schedule of figures of which that is a photostat came from—from where they came?

A. This schedule was prepared in our office and was sent to the Collector of Internal Revenue, or rather, it was delivered to the Collector on September 7th with our letter of that date, a letter from our office on that date.

Q. When you say the "Collector," to whom was it delivered?

A. I do not recall whether this was delivered to Mr. Ogden or to Mr. McDonald; one of the two.

Q. Prior to the delivery of this had you made any report or reduced to writing anything that occurred on August 30th at the Collector's Office?

A. Yes. After August—after the visit of August 30th, I wrote a letter to Loew's Incorporated summarizing what had [53] taken place and instructing them as to what arrangements we had made with the Collector's Office for obtaining the sailing permit.

Q. Do you have your retained office copy of the letter of August 30, 1938? A. Yes; I do. [54]

* * * * *

Q. By Mr. Zeitzius: Now coming back to the August 30th transaction, was there any discussion with

(Testimony of J. R. White)

respect to whether the income at that time must be reported by one or both plaintiffs?

* * * * *

A. Well, August 30th I think that we were there probably an hour and a half. [57]

* * * * *

The Court: Then, I would not ask the question in that leading form in which you ask it. I would merely ask him if there was any discussion as to the manner of payment other than as he has already testified.

Mr. Zeitzius: All right; I shall adopt that question.

The Court: All right.

A. Yes. Following our conversation—we reviewed our discussion which we had had in June, and were told by Mr. Ogden, I believe it was, that the Collector's Office would not issue a sailing permit to Mr. Mertens until Mrs. Mertens' tax had also been paid; also, that they would not issue a sailing permit unless and until the tax that was paid was computed on income which included the tax which was to be paid.

The Court: That is, over and above what she paid in June; is that what you are talking about?

A. That is correct.

Q. \$3,245.92?

A. That is correct; the tax in June, computed on the basis of earnings up until June 25th.

The Court: Up to that time, I see. [58]

A. And the tax in August was computed on earnings until the end of the picture.

The Court: All right.

(Testimony of J. R. White)

Q. By Mr. Zeitzius: In computing the tax liabilities in September, 1938, were the returns made on the basis of the entire year from January 1, 1938, to September 1 or some nearby date?

Mr. Mitchell: Oh, I will stipulate that the returns speak for themselves and they do not include the whole year, only to the date of departure.

Mr. Zeitzius: Will you also stipulate that the June return was superseded by the wife's return marked Plaintiffs' Exhibit 8, the one filed September 7, 1938?

Mr. Mitchell: Assuming that the wife's return in June was valid, it was superseded by the second return, upon the assumption that the second return of the wife was valid, yes; that the period covered by the June return is also covered by the September return.

Mr. Zeitzius: That is correct.

The Court: On the face of this Exhibit 8 it shows that the taxable period was January 1, 1938, to September 1, 1938, so that this, of necessity, included the partial return which had been turned in in June. [59]

* * * * *

Mr. Zeitzius: I do not think I asked the witness whether or not with respect to Plaintiffs' Exhibit 5 he knows who produced pages 3, 4, 5, and 6, the last four pages of Exhibit 5.

Mr. Mitchell: Who produced those?

Mr. Zeitzius: Who produced the originals of those pages.

Mr. Mitchell: I will stipulate that Mr. White produced them.

(Testimony of J. R. White)

Mr. Zeitzius: That the witness produced them to the deputy collector at the time, on September 7.

Mr. Mitchell: 7th?

Mr. Zeitzius: 1938.

Mr. Mitchell: On behalf of his principals.

Mr. Zeitzius: On behalf of each of the plaintiffs.

Mr. Mitchell: That is right. [60]

* * * * *

Q. By Mr. Zeitzius: Was the same information submitted with respect to Victorine's return, or what is the situation as to that?

A. One letter was submitted and one set of statements, and it is my recollection that it was marked on the back of the wife's return that the income was as shown by a detailed schedule, a reference was made just to the detailed schedule. [61]

* * * * *

Q. By Mr. Zeitzius: Mr. White, I think I forgot to ask you whether there was any conversation with respect to the payment or manner of the payment of the tax in your discussion of August 30th at the Collector's Office.

A. You mean as to whether it should be paid in cash or cashier's check?

Q. That and where the cash should come from. [62]

* * * * *

A. I do not believe there was any conversation as to what means had to be used to pay the tax, whether it had to be cash or a check or not on August 30th.

Q. By Mr. Zeitzius: Was there any conversation with respect to whom or with respect to how the money

(Testimony of J. R. White)

would be obtained to pay the taxes that would be found due by Gravet and his wife?

A. There was a conversation—there was a controversy between Mr. Ogden of the Collector's Office, on one hand, and Mr. Levi and myself, on the other hand, as to the amount of income that had to be reported, and that controversy involved the question as to whether the tax was to be paid by Gravet or to be paid by Loew's. And when Mr. Ogden, on behalf of the Collector's Office, insisted that the tax be paid in the manner in which it finally was, Mr. Levi told him definitely that if that was the case, Loew's was not going to pay the tax but would only advance the money to Gravet or on Gravet's behalf. If that is what you have reference to in your question? I don't quite understand it. [63]

* * * * *

Q. By Mr. Zeitzius: What, if anything, was said with respect to the manner of computing the tax and by whom was [64] it said on August 30th?

A. On August 30th Ogden informed us that he had discussed this question with Maddux, of the agent's office, and that the information that had previously been filed would not be accepted in its whole; that, I believe, three changes would have to be made. One was that they would disallow a deduction for gratuities to studio employees of approximately \$119.00 and that the agent's office would not allow a deduction for—I think it was skin treatments, some type of medical treatments, of about \$775.00; and that they would insist that they include in income the amount of tax which would be paid, the amount of tax which would have to be paid before the sailing permits were issued. Mr. Levi told them, called

(Testimony of J. R. White)

their attention to certain decisions and rules and his interpretation of the legal aspects of the contract, and explained to Mr. Ogden the contention that Loew's was not required to pay Gravet's taxes until after they had been finally determined for the full year 1938, and the legal contention that they could not be determined until after December 31, 1938, no matter how many times or whatever was done in the meantime in the way of issuing sailing permits. Mr. Ogden—and I don't recall how much part Mr. McDonald took in this. He was there sometimes, but on this occasion he was not there as much as Mr. Ogden. Mr. Ogden said that the Collector's Office would not absolutely deny this position, but that in order to protect the revenues of the country they would [65] insist upon such treatment before they would issue the sailing permit.

Then I asked what they meant by the tax on the tax, what they meant by the amount of tax to be included; did they mean the first computation of tax, in other words, the income before, in taking up this item, was—if I can refresh my memory here on the figure, I can tell you the exact figure.

Q. Yes; you may.

Mr. Mitchell: May I ask, is the witness referring to working notes that he had before him at the time to refresh his memory?

A. I will. The income for each before this adding back any tax was \$56,954.19. And I asked if they—and the tax computed on that for each was \$11,692.97, of which \$1,020.41 had been withheld at the source by Warner Brothers and as such was not an issue in our controversy in the Collector's Office. So I asked whether

(Testimony of J. R. White)

they meant they should include this \$10,672.56 for Mrs. Mertens and \$11,692.97 for Mr. Mertens. I was told—Mr. Levi was with me—and was told—

Mr. Mitchell: By Mr. Ogden?

A. By Mr. Ogden, and was told that that would not be sufficient; we would not only have to include that amount in the income, but we would have to include the tax, also the tax that resulted from the inclusion of that amount, and keep that going on until the additional tax that had to be [66] computed by putting in the additional amount was less than one cent—less than half of one cent, then there would be no further computation.

It was after that, after we were informed of that, that Mr. Levi stated to Mr. Ogden that if that occurred, then Loew's would definitely not pay the tax, because they believed that this was not the correct way to compute it and that they felt that if it was incorrectly computed that they had no obligation, that Loew's had no obligation to pay Mertens for tax which was illegally computed.

Those are not the exact words but that is my best recollection on that part of the conversation. So then, I have forgotten whether Mr. Levi or myself, asked the Collector's Office to please compute the amount of tax that they wanted us to pay so we could get the sailing permit, because we had been instructed by Loew's, or I had, at least, by Loew's that it was absolutely necessary to get Mr. Gravet his sailing permit so he would be happy and could get out of the country and be back and be ready for another picture.

And Mr. Ogden expressed his inability to make the computation. And after a considerable discussion, I volunteered to make the computation which required the use

(Testimony of J. R. White)

of an algebraic formula. And I went back to my office and made the computation, after which I developed the schedule which was included with our letter of September 7th to the Collector's Office and the copy of which was sent to Loew's [67] Incorporated with our letter of September 30th.

Q. By Mr. Zeitzius: You mean August 30th?

A. I mean August 30th. I am sorry.

The Court: To what exhibit is that attached? What exhibit in the file is that computation attached?

* * * * *

Mr. Zeitzius: I think, actually, for the purpose of saving paper, there is only one and it is attached to Plaintiffs' Exhibit 5.

* * * * *

The Court: Yes. I have the letter here, the letter of September 7th, is that correct?

Mr. Zeitzius: Yes; that is right, that is with it.

The Court: And the material that follows with it?

The Witness: If I am correct, that computation is not in that letter. The amount shown on that letter and described is an amount required by him, that \$40,000 item there, your Honor. [68]

The Court: I don't know what you are talking about.

Mr. Zeitzius: Page 3 of Exhibit 5, your Honor.

The Witness: "1938 Federal Income Tax Claimed by Collector of Internal Revenue to be 'Constructively Received' from Loew's Incorporated." That is the amount of \$40,017.41. That is on page 3.

Mr. Zeitzius: Page 3.

(Testimony of J. R. White)

The Witness: Right there. (Indicating to the Court on exhibit.)

The Court: Oh, yes.

A. And the computation on that is not in this exhibit, but is in the working papers that I prepared at the time, and here is the formula.

The Court: I have a son who is a mathematician who would understand that, but I may not.

Mr. Mitchell: If the Court please, I do not pretend to be able to follow that, either, and for that very reason may I suggest that plaintiffs' counsel have a photostat or a copy made to introduce in evidence.

The Court: Explain in simple terms, leaving out those sines and cosines, formulas so dear to algebraists, what, reduced to its ultimate form, the formula was.

A. The formula involved guessing in which bracket the income would fall, in which tax bracket the income would fall. If you make a wrong guess you had to do it over, but if you made the right guess, why, you get it the first time. [69] Then you simply take the basic income, plus the application of the tax rate on the right bracket, and you had to subtract \$30 for California Unemployment Insurance, \$30 for Old Age Pension Insurance, and apply the surtax rate and the normal tax rate. Once you had the answer, it could be very readily proved, because, by including the amount in the income and then computing the tax, the tax would have to come out to be the amount which was included.

In this case there was \$301.78 worth of tax which I computed as being the tax on the French income, and on the bottom of this exhibit, in my handwriting, I made a little tabulation in order to prove to Mr. Ogden that the

(Testimony of J. R. White)

amount of \$40,017.41 was the amount that he insisted that be included in the income, and that is how this amount was arrived at.

Q. You took the amount he gave you and then you worked backwards, is that the idea? A. No.

Q. Worked back from it?

A. No. He told me the theories that he wished applied.

Q. Oh, the theory, I see.

A. Then I worked out the amount by this algebraic formula. It is self-proving and self-evident after you have the answer.

The Court: I see. All right.

Q. By Mr. Zeitzius: Can you state how many taxes [70] are pyramided in that \$40,017 item?

A. Not how many, but there are—they keep pyramided until the tax is less than one cent. In other words, until the additional tax from each computation is less than one cent, then you stop.

Q. When after August 30th did you next call at the Collector's Office?

A. At 10:30 in the morning of September 7th.

Q. Who were present with you at that time?

A. Mr. Mertens, Mr. John Melbourne of Loew's Incorporated.

Q. And who were present on behalf of the Collector?

A. We called at Mr. McDonald's office and I believe he referred us to Mr. Ogden, and we went to Mr. Ogden that morning.

(Testimony of J. R. White)

Q. Do you recall whether or not Mr. McDonald appeared on the scene?

A. Mr. McDonald was there and was with us part of the time. I can't recall just how much of the time he was with us.

Q. Will you please state whether anything was said at that time? What did Mr. Gravet say at that time? Do you recall the conversation on his part?

A. I think his principal conversation was concerned with the—it is my recollection of his principal conversation that it was concerned with the complications and [71] difficulties of getting his taxes paid and getting out of the country.

Q. What was said by you and Mr. Levi? Will you please state as much of the conversation as you can remember and what you did on that occasion?

A. As I recall it, I introduced him to Mr. McDonald, Mr. Ogden, and presented—

Mr. Mitchell: Excuse me. Introduced Mr. Levi?

A. No; Mr. Gravet.

Mr. Mitchell: Oh.

A. Mr. Gravet to Mr. McDonald and Mr. Ogden, and we sat down with them and I handed them this letter which is attached to that form, and the schedules.

Q. By Mr. Zeitzius: You mean the letter of September 7th?

A. The letter of September 7th.

Mr. Mitchell: Attached to Exhibit 5?

The Witness: I presume that is the number.

(Mr. Zeitzius handing exhibit to witness.)

(Testimony of J. R. White)

A. And from that Mr. Ogden filled in the forms 1040C. After that Mr. Gravet exhibited his passport.

Q. By Mr. Zeitzius: To the deputy collector?

A. Yes. And—

Q. Did you see it?

A. Yes; I saw his passport. I saw him handing it to him. I did not handle it or look at it closely myself. [72] And he was asked when he was leaving and on what steamship; and he told them that he was leaving from New York.

After the form was completed and filled out, Mr. Ogden was satisfied as to the computation and he asked me to prove that the \$40,000 item was the item that he wanted in the income, and I made that tabulation on the bottom to do that, then we proceeded to the cashier's window and when we got to the cashier's window we found, to my chagrin, that we had cashier's checks which I had requested them to bring, and cash, and the collector would not accept the cashier's checks, and so they had to be sent back to the bank and cash obtained to pay the tax and get the sailing permit. And while that was done I sat in the lobby with Mr. Melbourne and Mr. Mertens and discussed with him the whole situation.

Q. I hand you Plaintiffs' Exhibit 6 and ask you whether you were present when that return was made out?

A. Yes; I was.

Q. In whose handwriting is that return prepared? That is Exhibit 6.

A. I am unable to say. I do not recognize the handwriting as anyone that I know. I recognize Mr. Ogden's signature, I think, but I don't know the handwriting.

(Testimony of J. R. White)

Q. By the Court: You say Mr. Ogden prepared the statement. I notice he also verified it—I mean, took the oath of the taxpayer on it.

A. Yes. I am uncertain whether Mr. Ogden actually [73] wrote it out, or whether Mr. McDonald, or whether a girl did, Mr. Ogden's assistant, actually wrote it out.

Q. He took the taxpayer's affidavit? A. Yes.

Mr. Mitchell: I am informed by Mr. McDonald that he believes this is the handwriting of Mr. Ogden. I will so stipulate.

Mr. Zeitzius: All right.

Mr. Mitchell: That is, the longhand entries.

Mr. Zeitzius: That is right; all the longhand writing and entries on Plaintiffs' Exhibits 6 and 8.

Mr. Mitchell: That is right.

Mr. Zeitzius: It is agreed between counsel are in the handwriting of Mr. Ogden, whose name appears on the back as the deputy collector who took the oath of the taxpayer.

Q. In the presence of the deputy collector on September 7th was anything said or were any questions asked concerning Mr. Mertens' intent as to the future, as to whether he would or would not return to the United States?

A. I don't recall any definite question was asked him at that time. I do know that he had told me that he intended to come back. [74]

* * * * *

Q. Was the question of Mr. Mertens' residence discussed on September 7 at the office of the deputy collector?

(Testimony of J. R. White)

A. No. On September 7th all that was necessary to do was to file the information and pay the tax, and those things had all been discussed and agreed upon before.

Q. You mean by the earlier meeting of August 30th?

A. At the earlier meeting of August 30th, at the meeting in June and at the meeting at the times that we had been there. Mr. Levi and I were down there on August 25th or 26th or approximately then. [75]

* * * * *

Q. By Mr. Zeitzius: Did you ever have any conversation with Mr. Mertens with respect to his intent to return or not to return to the United States, say, in the month of August or September, 1938?

A. Not in the month of September, but Mr. Mertens told—

Q. Do not say what occurred. Did you ever have any conversation in that respect? A. Yes.

Q. When was such a conversation had by you with him? A. June, 1938, and in August, 1938.

Q. Who were present at the conversation occurring in June?

A. In June it was in the Collector's Office and Mr. McDonald was present and Mr. Mertens was present, Mrs. Mertens was present, Mrs. Schulburg was present, Mr. Melbourne was present.

* * * * *

Q. By Mr. Zeitzius: What about the conversation concerning that matter in August? Who were present at that conversation and when was it? [77]

A. Mr. Levi and I were present—

Mr. Mitchell: What was the date of this?

(Testimony of J. R. White)

Mr. Zeitzius: I am asking him when in August.

A. It was around the—can I refer to my excerpt I made from my notes?

The Court: Any notes that help you to refresh your recollection you may refer to.

* * * * *

A. On the 16th or 17th of August.

Mr. Mitchell: 16th or 17th.

A. And Mr. Levi and I called at the studio and got Mr. Mertens off his set where they were shooting, finishing the picture "The Great Waltz," and went with him to his dressing room, where he furnished me with the information to compile for submission to the Collector's Office. At that [78] time I asked him whether his intention was to return to this country and he said that it was, and he expected to be gone for a few months and that he might make one picture in France before he came back to this country, and he expected to come back and make another picture for Loew's.

Q. By Mr. Zeitzius: Do you know whether—

Q. By the Court: I gather Mr. Gravet speaks English?

A. Yes; he speaks English.

Q. By Mr. Zeitzius: Do you know whether he had been in the United States, from your talk with him at that time or earlier, whether he had been in the United States prior to 1938?

A. In June, on the occasion of our visit to the Collector's Office, he told me that he had been in the United States in 1937, I believe it was, on a visitor's permit, and that he and Mrs. Mertens had both left the country and

(Testimony of J. R. White)

that they had come back in under the quota. I also believe that—the best of my recollection is that Mr. McDonald showed me a card in the Collector's Office which indicated that he had obtained a sailing permit at an earlier date.

Q. I next ask you whether you prepared the claims for refund which are in evidence as Plaintiffs' Exhibits 9 and 10?

A. Yes; I prepared both of these claims.

Q. Do you mean both for Mr. and Mrs. Mertens?

A. Yes; one for each. [79]

Q. And did you mail or cause them to be mailed to France for their signatures? A. Yes.

Q. Were they in due course returned to you, signed by Mr. and Mrs. Mertens, respectively?

A. Yes. [80]

* * * * *

Q. By Mr. Zeitzius: After the filing of the claims for refund were there any conferences which you attended with the revenue officials?

A. Yes. I attended a conference with Mrs. Flint, I think it was, of the agent's office, and I attended a conference with representatives of the technical staff.

Q. At the conference with the agent's office what was discussed, the contents of what document?

A. The whole case was discussed and the contents of [95] the claim for refund and returns and the contentions were made on behalf of the taxpayer.

Q. What occurred at the conference before the technical staff?

A. The same as before the agent's office. Neither the agent's office nor the technical staff would concede the

(Testimony of J. R. White)

principle point at issue; and they told us that if we would concede the principle point at issue, they would be willing to allow the other points, which were immaterial, I mean in amount, they were very small in amount; but if we were not willing to drop the main claims, why, they might as well stand on the whole thing and not allow anything, and simply deny the whole claim.

Mr. Mitchell: I move that the last answer be stricken on the ground that it is immaterial.

The Court: No. It just merely confirms the letter, that they were not conceding anything. After all—

The Witness: That is right.

The Court: All right.

Q. By Zeitzius: Did these Internal Revenue officials at these conferences question the items of deductions in the refund claim schedule?

A. As far as gratuities to studio employees were concerned, they admitted that those would be allowable, because there had been a change in the rulings of the Department between the time the return was filed and the [96] claims were considered. As far as the additional depreciation on the automobile and the adjustments for rent and the loss from the farm, those were all right. They did not at that time see fit to allow the dental and skin treatments, but they said, to settle the case they would.

Q. Was anything said with respect to the propriety of treating them as resident aliens for the calendar year?

A. No. That question was never raised until after the returns were filed, as far as I know.

(Testimony of J. R. White)

Q. Was anything said with respect to whether or not they were entitled to use the calendar year basis as shown in the refund claim?

A. Yes. They said that if you will drop the main point, we will let you have all these little points to settle you, because the amount of tax involved was so small that it was an easy settlement.

Q. So that would you say the schedule based on the entire year, that is, the items making up the schedule attached to the refund claim for the entire year, was before the agent's office and before the technical staff, and that they did not question the correctness of the amounts as amounts which they purported to be?

Mr. Mitchell: I object to that question as highly leading.

The Court: Well, it is a leading question. He has already stated what they said and it is evident—the first [97] part I will allow, as to whether these additional amounts computed on the basis of the whole year were before them. To that extent I will let him answer that question. But the second part calls for a conclusion. Go ahead.

A. The entire claim was before the people of the technical staff.

Q. By the Court: And various items were discussed?

A. The various items, all of the items, were discussed.

Q. But you would not budge and they would not budge, so you got nowhere?

A. That is right.

Mr. Zeitzius: If it is understood that the purport of the witness' testimony is, then, that the revenue officials

(Testimony of J. R. White)

at both of these conferences did not question the correctness of the amounts as amounts—

The Court: Well, I think that is evident from the testimony.

Mr. Zeitzius: —then I have no further questions from him this afternoon.

The Court: All right. You have not completed your examination of him?

Mr. Zeitzius: Not quite. When I go through these things I may have some odds and ends. [98]

* * * * *

Mr. Zeitzius: Before proceeding with the witness, I would like to call on Mr. Mitchell and ask if he has government's copy of a letter dated October 22, 1940, to the Internal Revenue Agent in Charge, from Price-Waterhouse, apparently "J. R. White" are the initials at the bottom of it, relating to Mr. and Mrs. Mertens' 1938 income tax. The government should have the original in its possession.

Mr. Mitchell: On that one, Mr. Zeitzius, I will waive the production of the original and stipulate that this is a true copy that the government has received.

Mr. Zeitzius: All right. Then I will ask with respect to whether he has government's copy, retained copy, the letter dated September 30, 1940, addressed to the Internal Revenue Agent in Charge?

Mr. Mitchell: September 30?

Mr. Zeitzius: Yes; by Price-Waterhouse and Co.

Mr. Mitchell: Yes. I will waive the production of the original of that, too, and stipulate that it was received by the addressee. [103]

* * * * *

(Testimony of J. R. White)

Mr. Zeitzius: At this time I offer into evidence the letter of September 30, 1940, addressed to the "Internal Revenue Agent in Charge" by Price-Waterhouse, the production of the original of which has been waived by the parties.

Mr. Mitchell: I would suggest, first, the letter to which this is a reply be introduced so that they will be understandable, they will be chronological, and therefore in understandable order.

* * * * *

Q. By Mr. Zeitzius: Mr. White, do you have in your possession a letter from Internal Revenue Agent George D. Martin, dated September 16, 1940, addressed to Loew's Incorporated? [104]

A. No, sir. I have a copy, what purports to be a copy.

* * * * *

Mr. Zeitzius: All right. I ask that these be marked for identification, letter dated September 16, 1940, from Internal Revenue Agent in Charge George D. Martin to Loew's Incorporated.

The Clerk: 15 for identification, a copy.

(The document referred to was marked Plaintiffs' Exhibit 15, for identification.)

(Testimony of J. R. White)

[PLAINTIFFS' EXHIBIT 15]

C TREASURY DEPARTMENT
O INTERNAL REVENUE SERVICE
P LOS ANGELES, CALIF.
Y

September 16, 1940

Loew's Incorporated,
10202 Washington Blvd.,
Culver City, Calif.

In re: Fernand Mertens

Sirs:

This office has information to the effect that in 1938 an income tax was paid to the Collector of Internal Revenue and that in 1939 reimbursement was made by you in accordance with a contract.

It is requested that you state the amount which was paid to Mr. Mertens in 1939 and the date of payment.

Your reply should be forwarded to this office for the attention of Mrs. Flint.

Respectfully,

(Signed) George D. Martin

Internal Revenue Agent in Charge

LDF:hms

[Endorsed]: Case No. 3002. vs.
Pltf. Exhibit 15. Date 3/31/44. No. 15 Identification.
Date 3/31/44. No. 15 in Evidence. Clerk, U. S. Dis-
trict Court, Sou. Dist. of Calif. L. J. Somers, Deputy
Clerk. [130]

(Testimony of J. R. White)

Mr. Zeitzius: And I hand that letter so marked to the witness, and ask him whether he received that, the original or a copy thereof; if so, whether he made a reply thereto?

A. On September 25, 1940, we received a—by “we” I mean Price-Waterhouse & Co.—received a copy of a letter identical with this. [105]

* * * * *

A. —from Loeb & Loeb, with the request that we answer it, which we did by a letter dated September 30, 1940, addressed to “Internal Revenue Agent in Charge.”

Mr. Zeitzius: I ask that this letter which is dated September 30, 1940, addressed to the “Internal Revenue Agent in Charge” from Price-Waterhouse & Co., be marked as Plaintiffs’ Exhibit 16, for identification.

The Clerk: So marked for identification.

(The document referred to was marked Plaintiffs’ Exhibit 16, for identification.)

Mr. Zeitzius: I hand you what has been marked for identification Plaintiffs’ Exhibit 16 and ask you if that is a true copy of the reply which you made?

A. That is a copy that agrees with the retained copy that we have of the letter, so I assume it is a true copy. [106]

Mr. Zeitzius: I offer into evidence as Plaintiffs’ Exhibit 15 the letter of September 16, 1940, marked for identification and identified by the witness, as Exhibit 15.

Mr. Mitchell: We object to it only on the grounds that it is wholly immaterial and it merely encumbers the record. While it does relate to these taxpayers, I think the witness can testify that the revenue agent was misinformed, so

(Testimony of J. R. White)

that it is of no help to the Court whatever, either Exhibit 15 or Exhibit 16 for identification.

Mr. Zeitzius: I think that that, your Honor, taken together with Exhibit 16 which I shall offer next, is clearly a part of the case. It shows the position as supposedly maintained that this was a loan and not constructively received, the main amount in question here of some \$40,000, and I submit that it shows what was before the revenue officials and the position taken by the parties here at all times.

The Court: I will overrule the objection. This has bearing upon the relationship between the parties and the agreement, which is Exhibits 1 and 2, under which the method of payment of the taxes was arranged. [107]

* * * * *

Mr. Zeitzius: I next offer into evidence Plaintiffs' Exhibit 16, the letter dated September 30, 1940, which has been marked and identified as No. 16 by the witness.

Mr. Mitchell: Defendant makes the same objection, and the further objection that the letter is full of self-serving declarations and conclusions of law and factual conclusions which the government does not concede, nor does the government concede that the contention that the money paid was a loan has been steadfastly adhered to by the taxpayer.

So that the issue will be clear, it is the government's contention that the loan theory was an afterthought and it is contrary to the original agreement of the parties, the contract of employment.

The Court: I think that this letter, written in response to the request for information by the agent in charge, is certainly admissible.

(Testimony of J. R. White)

The government cannot insist that only such a statement by the agent as coincides with the government's view, and a contrary assumption in which he acquiesced can't be considered in this particular case. Nor is the government in a position to say that the parties, among themselves, could not modify the contract. The government can't insist that that contract could not be modified by the parties to it. There already is evidence in the record that it was stated that the money would be [108] advanced.

Mr. Mitchell: I don't think the government could modify it.

The Court: The government, in insisting on the paying all the tax on the 7th, the government could not make law by the tax. That was an agreement between them. They could have thrown up the entire contract.

Mr. Mitchell: The government does not contend they could not change the contract.

The Court: By oral agreement.

Mr. Mitchell: Of course, they could.

The Court: All right. Then the government is not in a position to say that they could not change it.

Mr. Mitchell: The government does not so contend, your Honor.

The Court: Whether these have the effect of showing a change, that is a question to be determined later on.

Mr. Mitchell: That is correct. This, though, is a self-serving declaration.

The Court: Nothing is self-serving when a government official asks for information and the taxpayer states his position in the case. The government did not have to

(Testimony of J. R. White)

ask. It is none of his business. He has gotten the tax. Why did he write the letter? [109]

* * * * *

The Clerk: 16 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 16, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 16]

PRICE, WATERHOUSE & CO.

530 West Sixth Street

LOS ANGELES

September 30 1940

Internal Revenue Agent in Charge,
12th Floor U. S. Post Office and
Court House Building,
Los Angeles, California.

Attention: Mrs. Flint

Dear Sir:

FERNAND MERTENS

We have been requested to reply to your letter of September 16 1940 addressed to Loew's Incorporated regarding the 1938 and 1939 Federal income taxes of Fernand Mertens. Your letter requests information regarding any amounts paid to Mr. Mertens in 1939 as reimbursement for 1938 income tax paid to the Collector of Internal Revenue before Mr. Merten's departure from the country in 1938.

Apparently there is some misunderstanding of the facts by your office. When Mr. Mertens applied for his clear-

(Plaintiffs' Exhibit 16)

ance papers in September of 1938 the position was taken that Loew's obligation to pay Mr. Merten's taxes was an obligation only to pay such taxes as might lawfully be assessed against him and that the amount of the obligation could not be determined until the close of the year with respect to which the taxes had accrued. The Collector disagreed with this view and insisted upon the tax being included as additional income in the year of receipt of the earnings and in order to obtain the clearance papers it was necessary for Mr. Mertens to accede to the Collector's view to the extent of paying the tax demanded of him, which amounted to some \$40,000. Accordingly Loew's loaned this amount to Mr. Mertens in 1938 and the amount was paid by Mr. Mertens to the Collector with the understanding between him and Loew's that as soon as the correct amount of tax liability had [131] been lawfully determined the loan would be credited with the amount of the correct liability and the balance of the loan was thereupon to be repaid by Mertens to Loew's.

Internal Revenue Agent

in Charge

-2-

September 30 1940

We are informed by representatives of Loew's Incorporated that:

(1) No reimbursement was made to Mr. Mertens in 1939 since during that year there had not been any determination of liability for that tax,

(Plaintiffs' Exhibit 16)

(2) Mr. Mertens is still indebted to Loew's for the sum of \$40,017.41 advanced to him in 1938 and that no adjusting entries or payments have since been made with respect to this advance, and

(3) During 1939 Loew's paid to the State of California the following sums in respect of 1938 California income tax of Mr. and Mrs. Mertens:

	<u>California income tax of</u>	
	<u>Mr. Mertens</u>	<u>Mrs. Mertens</u>
Instalment paid:		
April 1939	\$ 978.49	\$1,007.85
August 1939	978.49	1,007.85
December 1939	978.49	1,007.85
	<hr/>	<hr/>
	\$2,935.47	\$3,023.55
	<hr/>	<hr/>

which amounts were also charged as advances to Mr. Mertens so that at the present time he is indebted to Loew's for a total of \$45,976.43.

Yours very truly,

Price, Waterhouse & Co.

Copies to—

Loew's Incorporated

Attention of Mr. Melbourne

Messrs. Loeb and Loeb

Attention of Mr. Leon Levi

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 16. Date 3/31/44. No. 16 Identification. Date 3/31/44. No. 16 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [132]

(Testimony of J. R. White)

Q. By Mr. Zeitzius: Mr. White, do you recall the letter which was a part of Exhibit 11, of October 17, 1940, from the Internal Revenue Agent in Charge?

A. No; I don't remember that.

Q. I hand you the original, which is in evidence as part of Plaintiffs' Exhibit 11, and ask you whether you made a reply to that letter of October 17, 1940?

A. We replied to that on October 22, 1940.

Mr. Zeitzius: I would like to have marked for identification the letter dated October 22, 1940, or, rather, a copy of such a letter, addressed to "Internal Revenue Agent in Charge," signed with the initials "J. R. White."

The Clerk: 17 for identification.

(The document referred to was marked Plaintiffs' Exhibit 17, for identification.)

Q. By Mr. Zeitzius: I hand you what has been marked for identification as Exhibit 17 and ask you if you will state what it purports to be a copy of?

A. This is a copy of our office copy of a letter [113] dated October 22, 1940, the original of which would be on Price-Waterhouse letterhead and signed "Price-Waterhouse & Co" and not with initials.

Q. Did you send the original, or was, according to your records, the original sent to the Internal Revenue Agent in Charge?

A. According to our records the original was sent to the Internal Revenue Agent in Charge.

Mr. Zeitzius: I offer into evidence what has been marked for identification as Plaintiffs' Exhibit 17, and counsel has received a copy of it.

(Testimony of J. R. White)

Mr. Mitchell: The direct foundation is waived and no objection.

The Court: All right. Admitted.

The Clerk: 17 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 17, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 17]

COPY

COPY - LOS ANGELES

October 22 1940

JRW:MEC

Internal Revenue Agent in Charge,
Twelfth Floor, United States Post Office
and Court House Building,
Los Angeles, California.

Attention: Mrs. Flint

Dear Sir:

MR. FERNAND MERTENS
MRS. VICTORINE CATHERINE MERTENS

1938 Federal Income Tax

We acknowledge receipt of your letter of October 17 1940 addressed to the above taxpayers. We understood at the time of our discussion of this matter with Mrs. Flint that her recommendation would be that the claim for refund be disallowed. However, we also understood that an opportunity would be given for the filing of a protest and presumably for an oral hearing with the conference section of your office. We were therefore somewhat sur-

(Plaintiffs' Exhibit 17)

prised to observe that your letter of October 17 1940 did not provide for the filing of a protest.

Yours very truly,

JRW

Copies to—

Messrs. Loeb & Loeb

Loew's Incorporated

Copies to

New York ✓

San Francisco ✓

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltfs. Exhibit 17. Date 3/31/44. No. 17 Identification. No. 17 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk. [133]

Mr. Zeitzius: I now have a few questions of the witness, preparatory to turning him over for cross examination.

Q. On yesterday I believe you testified concerning a conversation that occurred in the Collector's Office on August 30, but I don't think I asked you at that time whether there was included in the conversation any discussion as to who were to put up the amount of tax money which would be computed and paid with respect to the Plaintiffs' incomes then under consideration. [114]

A. You want me to relate the conversation—

Q. Do you recall—

A. —as I recall it on the 30th, or the—

Q. On the 30th.

A. —or any of the conversation before that time about it, or not?

(Testimony of J. R. White)

Q. Well, before and—yes; start before, if you recall any.

A. The question as to who was to pay the taxes and whether or not it was taken into income first arose in discussions between the time that Mrs. Mertens left the country and Mr. Mertens left the country, as to the problem; and there were various discussions at various dates between Mr. Levi, who was attorney for Loew's, and myself, a Mr. Singer, who was a tax man for Mrs. Schulburg, Mr. Mertens' agent, and a Mr. Melbourne, Mr. Henderson—Hendrickson, and Mr. Craig of Loew's. And the problem was being faced as to the legal status of whether or not this money was to be included as income. I was consulted, not as an attorney, because I am not one, but as an accountant familiar with tax procedures, and Mr. Levi, as to the method of how this should be handled. And the—

Mr. Mitchell: May I ask that the time be fixed?

A. I am sorry, I can't state exact dates when these discussions took place, except to say that they were between July 25th and August 30th. [115]

The Court: All right; that is close enough.

* * * * *

Q. By Mr. Zeitzius: What I want, Mr. White, is suppose you confine your answer at the moment to August 30, or within a couple of days of August 30, when the matter was taken up with the revenue officials at that time.

A. The conversation was first with Mr. Ogden of the Revenue Agent's Office on about the 25th or 26th of August. Mr. Levi and I were there and Mr. Levi stated the contention of Loew's that they did not owe this money

(Testimony of J. R. White)

to Gravets and did not have to pay Gravet for—reimburse him for this tax until after the tax had become final. That explanation was given in support of Mr. Levi's argument that the amount should not be included in income.

Mr. Ogden asked who was going to pay the money and how it would be paid; and Mr. Levi replied that, if necessary, [116] he would—if necessary, Loew's would loan the money; that it might be necessary for Gravet to put up a bond, or an attempt would be made to have Gravet pay the money himself.

On the 30th, Mr. Levi told me that—

Mr. Mitchell: Now, just a moment. Was this in the presence of Mr. Ogden or Mr. McDonald?

A. I think what I was about to refer to was in the presence of either Mr. Ogden or Mr. McDonald. [117]

* * * * *

Q. Did you have a conversation with Leon Levi, he acting for Loew's, with respect to whether this money to be advanced for taxes should be by way of a loan to Gravet or otherwise? A. Yes.

* * * * *

Q. By Mr. Zeitzius: Did you thereafter talk to Mr. Mertens concerning that conversation?

A. Yes; I did.

Q. Did you impart to Mr. Mertens—approximately when thereafter did you talk to Mr. Mertens about that? [120]

A. On September 7, 1938, while we were waiting for the cashier's checks to be changed into cash for paying the tax.

(Testimony of J. R. White)

Q. What was your conversation with Mr. Mertens on September 7?

A. I summarized the reasons why the Collector of Internal Revenue had required this inclusion of this \$40,000 in the income and the reasons why I was informed that Loew's would refuse to recognize their liability to pay this tax; and that I had been informed that Loew's would insist on regarding this as a loan until the tax was finally determined; and that it would probably be necessary to file claims for refund at some later date.

Q. What did Gravet say?

A. He told me he understood the matter and that he had been told that this would not result in any financial detriment to him and I pointed out to him then, in any event, he would owe the company at least \$300, being the tax on the French income.

Q. Did he indicate at that time whether or not he understood it was to be treated as a loan?

A. I definitely got the impression that he understood that it was to be treated as a loan. [121]

* * * * *

Q. By Mr. Zeitzius: Did you at that time or promptly thereafter inform Loew's Incorporated what had occurred on September 7th, or the substance of what had occurred?

A. Yes. The incident occurred in the morning, and that afternoon I dictated a letter summarizing the facts to inform Loew's what had been done, and I believe that

(Testimony of J. R. White)

letter was sent out of our office the next day, September 8th.

Mr. Zeitzius: I ask that there be marked for identification as Plaintiffs' Exhibit 18 the photostatic copy of a letter of September 8th, 1938, addressed "to Loew's Incorporated," by Price-Waterhouse & Co., of which I have the original also in my possession.

The Clerk: 18 for identification.

(The document referred to was marked Plaintiffs' Exhibit 18, for identification.)

Q. By Mr. Zeitzius: I hand you what has been marked for identification as Plaintiffs' Exhibit 18 and ask you whether or not that is a true photostatic copy of your reply, I mean the letter to which you referred in answer to the prior question? [122]

A. Yes; this is the copy of the letter.

Mr. Zeitzius: Before offering the photostatic copy in evidence, I would like to have counsel compare the original and the photostat and see if he is satisfied as to the photostat.

Mr. Mitchell: Yes.

Mr. Zeitzius: I offer into evidence what has been marked as Plaintiffs' Exhibit No. 18 for identification.

The Clerk: 18 in evidence.

Mr. Mitchell: The defendant objects on the ground that it is self-serving.

The Court: All right. Let us see what you have.

(Testimony of J. R. White)

Mr. Zeitzius: Does your Honor want to inspect the original?

The Court: All right, it doesn't matter. I don't think cameras lie.

Mr. Zeitzius: No. I meant for convenience on the eyes.

The Court: No. This is good. On these photostats white on black background is good. It is the reverse that is bad, where they have the white background with the black type.

This is a contemporaneous statement by an agent of conversations which had taken place, which sets forth the contentions of the government there made at or about the time the tax was paid, and certainly bears upon what was [123] intended to be done by everybody in the case. It can't be called a self-serving declaration, because from there they could still back out. The tax had only been paid the day before, hadn't it?

Mr. Mitchell: That is right, your Honor. It recites the conversation of the day before.

The Court: That is all right. People do not design alibis for law suits to be filed later, in 1943, on the 15th of September, 1938. To that extent it could not very well be called self-serving.

The Clerk: Admitted? It is admitted, your Honor?

The Court: Admitted, yes. Objection overruled.

(The document referred to was marked Plaintiffs' Exhibit 18, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 18]

PRICE, WATERHOUSE & CO.

530 West Sixth Street
LOS ANGELES

September 8 1938'

[Stamped]: F. L. H. Sep 9 - 1938

Loew's Incorporated,
10202 Washington Boulevard,
Culver City, California.

Attention: Messrs. Floyd Hendrickson
and John Melbourne

Dear Sirs:

MR. AND MRS. FERNAND MERTENS (GRAVET)

On September 7 1938 Mr. Melbourne and our Mr. White assisted Mr. Mertens in obtaining his sailing permit after payment of Federal income taxes for himself and Mrs. Mertens in the amount of \$37,073.27, the computation of which is shown in the statement which accompanied our letter of August 30 1938.

We explained fully to Mr. Mertens the arrangements which had been made with the Collector of Internal Revenue and the Collector's reasons for the requirement that the amount of \$40,017.41 be included in his income as having been "constructively received" from Loew's Incorporated. The company's contention that its liability to pay income taxes of Mr. and Mrs. Mertens could not be determined until the close of 1938 was discussed with Mr. Mertens and he informed us that he understood the problem and was quite agreeable that the amounts advanced by the company for the payment of his and Mrs.

(Plaintiffs' Exhibit 18)

Mertens' taxes should be considered as a loan until the amounts of the taxes are finally determined. We also informed him that it will probably be necessary to file completed 1938 Federal income tax returns in March 1939 and that it may be desirable at that time to file claims for refund.

Mr. Mertens was requested to supply us with statements of the 1938 operations of his farm and stable so that any loss from these ventures can be claimed in the completed returns.

It was explained that it was not necessary to file 1938 California income tax returns until April 15 1939.

Yours very truly,

Price, Waterhouse & Co.

Copy to—

Mr. Leon Levi

Copy to Mr. Melbourne 9-9-38/nt

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltf. Exhibit 18. Date 3/31/44. No. 18 Identification Date 3/31/44. No. 18 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. L. J. S., Deputy Clerk. [134]

Mr. Zeitzius: Now, I believe there are just about two more questions. I have doubts as to whether the equivalent of Rule 50 would necessarily cover that which I am going to ask. So, therefore, I will ask the witness:

Q. Who furnished you the information in the refund schedules that we talked about yesterday, consisting of the amounts of income and deductions therein set forth?

(Testimony of J. R. White)

A. The income and deductions, this information was furnished as to salary income by Loew's Incorporated and Warner Brothers, and also by Gravet; as to deductions, by Gravet; and as to the French income and deductions, by Gravet by means of a letter or correspondence after he had [124] gone back to France.

Q. Do those schedules which you examined yesterday correctly show all of that information, that is, the amounts of income and deductions which you set forth in those schedules in the refund claims, as given to you, I mean?

Mr. Mitchell: I think that he has sworn to that and the claim shows on the face of it that he did.

Mr. Zeitzius: All right. If that is your understanding, that that evidence is in the case, I shall not ask for an answer.

Mr. Mitchell: I will stipulate that the witness did not change the figures that were given to him.

Mr. Zeitzius: All right.

The Court: All right.

Q. By Mr. Zeitzius: Did you make a computation on the basis of what would the tax be under the 1934 Revenue Act, using the income and deduction figures used in the tax returns filed on September 7, 1938, for each of the plaintiffs? Did you make such a computation using those figures but without the item of \$40,017.41?

Mr. Mitchell: Just a moment. Does counsel mean the Revenue Act of 1936? He said "1934."

Mr. Zeitzius: No. I think '38 is the Revenue Act. Didn't I state that? [125]

* * * * *

A. I made such computations under the Revenue Act of 1938.

Q. By Mr. Zeitzius: Did you make it on the basis of—

(Testimony of J. R. White)

Mr. Mitchell: Just a moment. I don't quite get that clear. Is this referring to the refund claim of September 7?

The Court: No. He is asked if he made a computation, just like a summary by any accountant, of what the tax would be if you eliminated the \$40,000. Isn't that correct?

Mr. Zeitzius: That is correct. [126]

* * * * *

The Court: In other words, if the government insists upon payment in advance, before filing it, from an alien or anybody who wants to go out of the country, of necessity the government makes a guess and the taxpayer has a right to show then, in the light of subsequent events, what his actual liability was.

Mr. Mitchell: That is correct, your Honor. [127]

* * * * *

The Witness: These computations show that if—

Q. By the Court: This is your working sheet, isn't it? A. Yes, sir.

Q. You haven't got it transcribed, have you?

A. It is not transcribed; no, sir.

The Court: Why don't you have that copied and just let us put it in like a summary of a computation?

Mr. Mitchell: I would like very much to do that, your Honor.

The Court: Why don't we do it, have it written up? Here, take a look at it during the noon hour.

Q. By Mr. Mitchell: This is the computation of the tax?

A. This is (indicating). On this side is a computation of the tax, with the credits for personal exemption and [128] dependents for the period from January 1 to

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[Endorsed]: Case No. 3002. Mertens Mr.
 No. 19 in Evidence. Clerk, U. S. District

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(Testimony of J. R. White)

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The Court: No. He is asked if he made a computation, just like a summary by any accountant, of what the tax would be if you eliminated the \$40,000. Isn't that correct?

Mr. Zeitzius: That is correct. [126]

* * * * *

The Court: In other words, if the government insists upon payment in advance, before filing it, from an alien or anybody who wants to go out of the country, of necessity the government makes a guess and the taxpayer has a right to show then, in the light of subsequent events, what his actual liability was.

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* * * * *

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The Court: Why don't we do it, have it written up? Here, take a look at it during the noon hour.

Q. By Mr. Mitchell: This is the computation of the tax?

A. This is (indicating). On this side is a computation of the tax, with the credits for personal exemption and [128] dependents for the period from January 1 to

(Testimony of J. R. White)

September 1, 1938. This first computation is the amount of tax, without including any tax as income. The second computation, below here, up above that here, is the tax if you include only the first tax as income. In these—

Q. The general tax, you mean?

Mr. Zeitzius: No. He means—

A. No; the first tax.

Mr. Mitchell: The first tax on \$120,000?

A. The first tax on \$120,000. This column over here, which I have not put all the captions in, makes the same two computations but uses a full year's personal exemption and credit.

The Court: Supposing you have it transcribed and supply the captions and bring it back this afternoon. It is all in condition where anyone who is used to copying documents like this in an accounting office can get it out quickly.

The Witness: All right.

The Court: And then it may be marked. It will be given as a summary. You know the usual way we do with a copy of a summary.

Mr. Mitchell: We will have no objection at all. It will be very helpful, I think.

The Court: Yes.

Mr. Mitchell: In addition to that—

The Court: We will identify it now so we will know [129] what we are speaking of. What is the number?

The Clerk: 19.

The Court: 19. It will be exhibit 19 for identification.

(The document referred to was marked Plaintiffs' Exhibit 19, for identification.)

[PLAINTIFFS' EXHIBIT 19]

FERNAND GRAVET MERTENS
VICTORINE CATHERINE RENOURD MERTENS
TAX CALCULATIONS

Using credits for personal exemption and dependents for

Tax computed without including any income tax as income	<u>Eight months</u>		<u>Full year</u>	
	<u>Each spouse</u>	<u>Total</u>	<u>Each spouse</u>	<u>Total</u>
Income per returns filed September 7, 1938	\$77,425.11	\$154,850.21		
<u>Deduct</u> —"Income tax" included therein	20,008.71	40,017.41		
Revised income	\$57,416.40	\$114,832.80	\$57,416.40	\$114,832.80
Credits for personal exemption and dependents	1,100.00	2,200.00	1,650.00	3,300.00
Surtax net income	\$56,316.40	\$112,632.80	\$55,766.40	\$111,532.80
Earned income credit	1,400.00	2,800.00	1,400.00	2,800.00
Normal tax net income	\$54,916.40	\$109,832.80	\$54,366.40	\$108,732.80
Normal tax	\$ 2,196.66		\$ 2,174.44	
Surtax	9,670.74		9,487.78	
Total tax	\$11,867.40	\$ 23,734.80	\$11,662.22	\$ 23,324.44
<u>Tax computed by including above income tax as income</u>				
Surtax net income as shown above	\$56,316.40	\$112,632.80	\$55,766.40	\$111,532.80
<u>Add</u> —Total tax item shown above	11,867.40	23,734.80	11,662.22	23,324.44
Adjusted surtax net income	\$68,183.80	\$136,367.60	\$67,428.62	\$134,857.24
Earned income credit	1,400.00	2,800.00	1,400.00	2,800.00
	\$66,783.80	\$133,567.60	\$66,028.62	\$132,057.24
Normal tax				
Surtax	\$ 2,671.35		\$ 2,641.14	
	14,079.03		13,777.16	
Total tax				
	\$16,750.38	\$ 33,500.76	\$16,418.30	\$ 32,836.60

[Endorsed] Case No 3002 Mertens vs Rogan Plff Exhibit 19 No 19 Identification. Date 3/31/44
No. 19 in Evidence. Clerk, U. S. District Court, Sou Dist of Calif. L J Somers, Deputy Clerk.

[135]

(Testimony of J. R. White)

Mr. Mitchell: Do I understand that the witness has three separate computations? Does this include the first one that was originally submitted on August 25, 1938, to the Collector's Office?

The Witness: No.

Mr. Mitchell: I would ask that that be added to it.

Mr. Zeitzius: That I tried to get in yesterday with my letter of August 30, which I think was ruled out.

The Court: He objected to the letter. He did not object to the computation, and you can tear that off and put it in as a summary, if you want to, or have him attach it to this, say.

Mr. Zeitzius: Yes. I think the witness would say—

Q. Is this correct, Mr. White: That the summary that is attached to the return of one of the Mertens on September 7, 1938, is the same as the summary that you submitted here earlier to the Revenue Office?

A. Yes. In my opinion, it is not necessary to show the computation to arrive at this \$40,000 figure, because, once having arrived at it, it is self-proving and is much more clearly shown by just using the \$40,000 figure indicated, [130] because the answer proves at the bottom.

Mr. Mitchell: No; I am not referring to that. I am referring to the original computation that was submitted August 25 and was rejected by the Collector's Office. That was the original computation.

Mr. Zeitzius: Oh, I see. Yes; I am agreeable to producing that.

The Court: All right; you may supply that, Mr. White. You probably have it somewhere.

The Witness: Yes; it is right here.

Q. By Mr. Zeitzius: Then, did you also make a computation showing what would be the tax on the September

(Testimony of J. R. White)

7th return basis, with the inclusion only of the income and deductions shown therein and the addition, in lieu of the \$40,017.41, the addition of the tax on that income without \$40,000?

A. Yes. That is the second series of computations on the sheet.

Mr. Zeitzius: In other words, I wanted to be sure. From what was said to date it did not strike me that the witness had said anything about making such a computation.

The Court: All right.

Mr. Zeitzius: That is, the tax upon the inclusion of only one tax. If that be understood, then I have nothing further to ask the witness on that. [131]

* * * * *

LEON LEVI,

called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name?

A. Leon Levi.

Direct Examination

By Mr. Zeitzius:

Q. Your name is Leon Levi, L-e-v-i?

A. That is correct.

Q. Where do you reside?

A. In Los Angeles. [132]

Q. What is your occupation, Mr. Levi?

A. Well, at the present time I am a business man. I was an attorney at law up until the end of last year. I

(Testimony of Leon Levi)

am still a qualified attorney, although not actively practicing.

Q. You were a member of the firm of Loeb & Loeb, as I believe the parties have stipulated. You are the party referred to as Leon Levi in paragraph 17 of the stipulation, the last paragraph?

A. I was a member of the firm from the beginning of 1941 until the end of 1943. That is a period of three years.

Q. Yes.

A. Prior to that time, ever since 1931, I was employed by the firm.

Q. During 1938 you were employed as a lawyer by the firm of Loeb & Loeb?

A. That is correct.

Q. Did you know the plaintiff, Fernand Mertens, otherwise known as Gravet?

A. I met him.

Q. Will you state whether you met him at any time in the month of August, 1938?

A. I can't tell you definitely as to whether I met him during the month of August or not. I know that I met him and met with him prior to September 7 of 1938.

Q. And where was that?

A. That was at the studio, in his dressing room. [133]

Q. And who all were present?

A. At the conference I have in mind there was present myself and Mr. Jack Melbourne, who was then employed by Loew's Incorporated, and Mr. Gravet, and I believe Mr. White, although I am not positive as to whether Mr. White was present at this particular one or not.

(Testimony of Leon Levi)

Q. At that conference was there any discussion—oh, first of all, you are familiar with the tax controversy in this case?

A. I am very familiar with it.

Q. With respect to the time you mentioned in September, in what capacity were you acting at this conference? Who were you representing then?

A. I was representing Loew's Incorporated.

Q. What was the occasion of that conference with Gravet and the gentlemen you named?

A. We had been called on—when I say “we” there, I mean Mr. White and myself had been called upon—to expedite the obtaining of a sailing permit so that Mr. Gravet could leave the country.

Pardon me, may I ask that the question be repeated, please?

(Question read.)

A. Mr. White and I had had—

Mr. Mitchell: Excuse me. So that I will understand you, you are referring to the studio conference? [134]

Mr. Zeitzius: That is right; prior to September 7th.

A. Mr. White and I had had a series of conferences at the Collector's Office with a view to determining what would be necessary in order to obtain this sailing permit. And following those conferences and prior to the day that Mr. Gravet was to go down to obtain his compliance certificate, I went out to the studio for the purpose of meeting with him and explaining the whole thing to him, so that he would know what he was doing when he went down to the Collector's Office.

(Testimony of Leon Levi)

Q. What did you explain? You say you explained the whole thing to him. Just what did you tell him?

A. I told Mr. Gravet at that time that there was a very serious controversy with the government as to the amount of taxes that would have to be paid in order to obtain his compliance certificate. I pointed out to him that under the terms of his contract with Loew's Incorporated—

Mr. Mitchell: Just a moment.

The Witness: I will change that. I am sorry.

Mr. Mitchell: Just a moment. I make the same objection to the recital of this conference, on the ground that it is self-serving; that the plaintiff should be here to testify himself; that it is an indirect method of avoiding the customary burden.

The Court: I don't see it. Loew's is an adversary to Gravet in this controversy. Loew's is the employer to the [135] contrary of this gentlemen as representing Gravet. Loew's may testify to conferences he had with Gravet as to the meaning, and if indirectly it strengthens the position which Gravet takes in this case, it merely happens that both of them make the same contention.

Mr. Mitchell: I also object to the particular portion of his testimony as to the contents of a written instrument as not the best evidence and as a conclusion of the witness.

The Court: I have not heard him testify. He started to say something. He pointed out something. I don't know.

Mr. Zeitzius: That is right. He was pointing out the conversation with Gravet, were you not, Mr. Levi?

The Court: Overruled. Go ahead.

A. I pointed out to Mr. Gravet in that conversation, I pointed to the provisions of the contract which state that

(Testimony of Leon Levi)

Loew's will pay taxes lawfully assessed against him in the United States. I explained to him that it was the position of Loew's Incorporated that there was no liability on their part to make any payment to Mr. Gravet until such a time as taxes had actually been lawfully assessed against him; and that Loew's would not pay the taxes that the Collector of Internal Revenue was demanding as a condition to the issuance of this compliance certificate. I told him that I had been authorized by Loew's Incorporated to offer to lend him, lend Mr. Gravet sufficient money so that he could pay the tax as demanded by the Collector and secure his sailing [136] certificate, and that then we would have to let the question of the ultimate repayment of that loan hinge upon a final determination as to what his actual lawful tax liability was, once it was determined what taxes could or should have been lawfully assessed against him.

We had quite a lengthy conversation about that and Mr. Gravet understood it thoroughly and expressed himself to me as being in complete accord with that procedure.

We then arranged—at that time, at the date of that conference, the time and place of the final meeting with the Collector had already been determined upon. We were to go down, or he was to go down, rather, to the Collector's Office on September 7th at some specific hour, I think it was in the morning, and I called that all to his attention and made the arrangements for Mr. Melbourne to meet with him that morning and to see to it that he was escorted down to the Collector's Office.

Q. By Mr. Zeitzius: You referred to prior—

Mr. Mitchell: Excuse me. I don't know just who Mr. Melbourne is.

(Testimony of Leon Levi)

Mr. Zeitzius: Melbourne, Loew's employee.

A. Mr. Melbourne at that time was employed in the accounting department of Loew's Incorporated, and he was the man at the studio who handled the routine from an accounting end of tax matters.

Mr. Mitchell: I see. [137]

A. I was in charge of all of their tax matters, the legal end of all of their tax matters, and in effect supervised Mr. Melbourne in that phase of his work.

Q. By Mr. Zeitzius: Did you say you had—you did say that you had previously been at the Collector's Office; in fact, you had a series of conferences. Did you have occasion to come here on or about August 30, 1938, with Mr. White?

A. On August 30, 1938, Mr. White and I went together to the Collector's Office to receive the final word from the Collector as to what position he was going to take in the matter in view of the facts and information and arguments that had been submitted to him in our previous meetings.

Q. On the occasion that you went to the Collector did the question as to the source of the money that would have to be paid as taxes come up?

A. It very definitely came up when Mr. Ogden told me that the government, the Collector, was taking the position that the tax on the tax on the tax would have to be included in order to get the sailing certificate. I told Mr. Ogden—I knew him fairly well prior to that time, having been in school with him—and I told him in no uncertain terms that Loew's Incorporated was not going to pay that tax; that we would do one of two things: We would either arrange for Mr. Gravet to post a bond,

(Testimony of Leon Levi)

which he had the right under the law to do—post a bond pending the final determination of [138] the tax, and obtain his sailing permit that way, or more probably, that Loew's Incorporated would lend Mr. Mertens sufficient cash so that he himself could make the payment, but that in that case it was going to be regarded as a loan by Loew's Incorporated until such time as the lawful tax liability had been properly determined.

Q. Did he make any reply, Mr. Ogden, when you told him it would be a loan or regarded as a loan?

A. His only reply was that the Collector's Office felt that it was their obligation in issuing a sailing certificate, a compliance certificate, they felt it was their obligation to impose the tax on the highest possible basis that they could make seem reasonable under the circumstances, and that they could not issue the sailing certificate on any other basis.

Q. Was anything said as to the propriety of including more than one tax?

A. Well, there was a great deal said there. There had been a great deal said about that same thing in the meetings that we had had down there during the two or three days preceeding August 30th, because that was our whole issue and our whole argument. That was the reason why Mr. White and I decided to go down to the Collector's Office almost two weeks in advance of the sailing date, because we wanted to point out to the Collector, and we did point out to the Collector, that this issue existed and that it was [139] a complicated one and that it should be settled before the day on which Gravet came down there.

(Testimony of Leon Levi)

We took the position throughout the entire discussion that certainly there should not be any tax on the tax in any event, and according to my interpretation of the language "Lawfully assessed" that the government had no right to include that tax at all, even one tax, let alone the tax on the tax.

Q. And what reply to that, if any, did Mr. Ogden make?

A. Well, I have already stated that.

Q. Oh, I see.

A. That they had to collect on the maximum theory.

Q. On the maximum theory?

A. That they, in issuing a sailing certificate—it behooved the Collector to impose taxes on the maximum basis, giving the government the benefit of doubt on every issue involved. [140]

* * * * *

A. During our first conference at the Collector's Office Mr. White and I went, first, to Mr. McDonald's desk and talked to him. We showed the two agreements that constitute, one, the employment contract, and the other, the supplemental agreement that contains the clause that has reference to the payment of taxes.

The Court: Those are exhibits 1 and 2 in this litigation. You were here yesterday?

The Witness: I don't recall the numbers. I know they are in evidence.

The Court: 1 and 2.

Mr. Zeitzius: Let the witness look at Exhibits 1 and 2 and state whether or not those are the ones he is referring to now.

(Testimony of Leon Levi)

A. These are the ones. I called Mr. McDonald's attention particularly to the provisions of paragraph 1 of Exhibit 2. That is the paragraph wherein Loew's Incorporated agrees to pay the taxes, such taxes as may lawfully be [141] assessed against Mr. Gravet. And I called Mr. McDonald's attention, further, to the question that there would be, or, further, to the effect that there would be a question on the part of the Collector undoubtedly as to whether that tax should be incorporated into the return issued prior to obtaining the compliance certificate.

Mr. McDonald stated that the question was a novel question to him; that he did not feel disposed to answer it, but that he felt it should be answered by someone in the legal department of the Collector's Office. Mr. McDonald then took us to Mr. Ogden's office which was, if I remember correctly, on the same floor of the same building, way around the corner and at the end of a large room. We started all over again with Mr. Ogden, showing him these contracts and calling his attention particularly to that provision. Mr. Ogden in turn stated that, so far as he knew, it was a novel question at this Collector's Office and that he did not want to answer that question without consulting his superiors. He suggested that we leave the matter with him and come back at some later date for a reply.

And those were the events, then, that led up to the conference of August 30th, at which time Mr. White and I again went back and at which time we were advised of the decision which had been reached at the Collector's Office.

(Testimony of Leon Levi)

Q. Was there any discussion with respect to whether [142] the income of Mr. Mertens was community property or not?

A. There was discussion of that, but only comparatively minor discussion because it was agreed by everyone that it was.

Mr. Mitchell: I move that that part of that answer be stricken, that it was agreed.

The Court: "That it was agreed" is a conclusion. It may be stricken out.

Q. By Mr. Zeitzius: What was the conversation in respect to this discussion concerning community property?

A. We, Mr. White and I, told the gentlemen from the Collector's Office that it was our opinion that Mr. Gravet was entitled to claim community property under the laws of the State of California, being a resident alien and having resided and earned money here in California; but that we did not think that that question was particularly material, in any event, because the parties, Mr. and Mrs. Gravet, had informed us that they were married in France and that therefore the property would be community property under the laws of France, in any event. And I don't believe that there was ever—as far as I recall of, there was never any final decision reached by any of us as to which of those two grounds justified the use of the community property, but the community property distribution was consented to by Mr. McDonald and Mr. Ogden.

Mr. Mitchell: I move that that be stricken. [143]

The Court: That may be stricken out. The record does show. You are familiar with the tax returns that were prepared and finally signed by Mr. Gravet?

(Testimony of Leon Levi)

A. Yes; I am.

Q. And notarized by Mr. Ogden as a deputy collector?
A. I am.

Q. They are based upon splitting the income in two and then computing it on that basis. In other words, whatever your agreement, actually you split the maximum income in two and it was paid in that manner.

A. That is correct.

The Court: All right.

Mr. Zeitzius: I think of no further questions. You may cross examine.

Cross-Examination

By Mr. Mitchell:

Q. Mr. Levi, did you hear Mr. White testify yesterday that back there in early June, 1938, that you called him up and asked him to assist Mr. and Mrs. Mertens in procuring a sailing permit for Mrs. Mertens in June, 1938?

Mr. Zeitzius: May I ask if he is just asked whether he remembers? That is the question?

Mr. Mitchell: Yes. Answer yes or no.

The Court: Yes.

Q. By Mr. Mitchell: Did you hear Mr. White so testify?

A. If he so testified, I heard him because I was here [144] in the courtroom yesterday. That is a fact, however.

Q. You did? A. I did.

Q. How did you happen to do that?

Mr. Zeitzius: At this time—

Mr. Mitchell: This is not proper cross examination.

(Testimony of Leon Levi)

Mr. Zeitzius: That is right. That is my point.

Mr. Mitchell: But if counsel wants to let this witness go—

Mr. Zeitzius: I see. Go ahead.

The Court: Gentlemen, in a case of this character, a trial without a jury, the order in which evidence comes in does not matter so much. I have known Mr. Levi very long. I do not think he appeared before me. He did not do much court work. But I know his reputation and I know he is going to tell the truth, whether he is called as a government witness or called as a witness by the plaintiffs.

Mr. Zeitzius: I withdraw the objection I was about to make.

The Court: I have no desire to be technical and will allow him to bring in the facts at this time, because Mr. Levi is busy and he should be released as quickly as possible.

Mr. Zeitzius: I will withdraw all objection.

The Court: All right; go ahead.

Q. By Mr. Mitchell: How did you happen to make that arrangement, Mr. Levi? [145]

A. Well, either in May or June of 1938 it became obvious that we were going to have some questions involved, some complicated tax problems involved.

Q. When you say "we" whom do you mean?

A. Well, I mean, the way I used it there, I meant Loew's Incorporated and Gravet, both, because we regarded it all as one entity in our endeavor to secure the sailing permit. It was just as important for Loew's

(Testimony of Leon Levi)

Incorporated, I suppose, to see that he got what he wanted as it was for him to get it.

Q. This was before the contracts, Exhibits 1 and 2 were executed, was it not?

A. That is correct. At that time it was known that Mrs. Gravet was going then to leave the country, and we knew that sooner or later Mr. Gravet would want to go back to France.

Q. How did you obtain that information?

A. Well, I assume—I don't recall. I must have been called in by one of the studio executives who told me that Mrs. Gravet was getting ready to leave the country.

Q. I see.

A. When I started then examining the situation I realized that we had an immediate problem for Mrs. Gravet just on the community property issue alone, and then there was also the same question involved at that time as to whether Loew's Incorporated had any liability immediately [146] at that time for the payment of her tax; in other words, whether it could be regarded as an immediate lawful assessment.

And I advised the executives at Loew's Incorporated that I felt that Price-Waterhouse, Mr. White particularly, should be called in upon this job because I had just a few months before completed a rather similar situation out at Universal and Mr. White had handled the Schulburg end of that deal. I knew he was familiar with the problems and I felt that he should be called in to handle this one.

Q. For whom were you acting when you employed Mr. White?

A. Well, I was acting for Loew's Incorporated and—

(Testimony of Leon Levi)

Q. Who paid Mr. White's compensation for that June service?

Mr. Zeitzius: I object on the ground it is immaterial who paid Mr. White for his services, where it appears that— [147]

* * * * *

A. Well, I am quite certain that Loew's Incorporated, Metro, did. I think you have two better witnesses to that fact here.

Mr. Mitchell: Very well.

A. But I am quite sure they did.

Mr. Zeitzius: May it be understood, of course, that the testimony goes in under this objection, so we are not in a position of waiving it, and that there is no attack in the pleadings on the part of the government. The answer sets up no defense of which I am aware for a contention that may be in Mr. Mitchell's mind in asking that question. I do not [148] know just exactly why he is asking it, but that will develop. [149]

* * * * *

The Court: All right; it will remain.

Mr. Mitchell: And I do not know what the answers will be.

The Court: His answer is that he thought they had paid it, but that we have two persons in the courtroom who can probably give you a more definite answer than he can, [150] although his own impression is that Loew's paid it.

Q. By Mr. Mitchell: Mr. Levi, did I understand you correctly to state that at this studio conference just prior to September 7, 1938, you were then representing Loew's Incorporated?

A. That is correct.

(Testimony of Leon Levi)

Q. At that conference?

A. Yes; that is correct.

Q. Mr. Levi, you referred to the conversations relating to the proposition that Loew's would do one of two things: Either arrange a bond or security in order to procure the travel permit under the section 146 of the Statute, or would loan the money to Mr. Gravet.

A. Well, I—

Q. I have not asked my question yet. You told that to Mr. Gravet on that occasion, as I understand it. Do I understand you correctly? Is that correct?

A. Well, I don't think I said quite as specifically as you did that Loew's would arrange the bond.

Q. Or that a bond would be arranged?

A. That a bond would be arranged.

Q. Either one or the other?

A. Because I didn't know at that time—in fact, never did find out what would be needed to get that bond. It is perfectly possible that Gravet might have raised it himself without any assistance from Loew's, and it is [151] equally possible that Loew's might have had to assist him in some way in raising it. I didn't know.

Q. At this conversation with Mr. Gravet or Mr. Mertens on this subject he said, did he not, that any arrangement Loew's might make regarding procurement of the sailing permit would be all right with him so long as it didn't cost him anything financially, or something to that effect?

The Witness: May I hear the beginning of that question? I want to know what conversation you are talking about.

(Question read.)

(Testimony of Leon Levi)

A. Well, it was not as simple as that. There was quite a bit of discussion and conversation, and even argument, about this loan proposition. He did, however, finally agree that he—

* * * * *

A. Well, he did finally say, after considerable discussion he finally said that it was satisfactory to him that the money that Loew's was to advance should be regarded as a loan and that the ultimate liability would await determination of the final assessment.

Q. All right. That was at the studio conference just prior to September 7? [152] A. Yes.

Q. And Mr. White was present, or was he?

A. Well, I am not positive on that. My recollection is that he was. I have no idea what his recollection is on that.

Q. And that—we will call it an understanding regarding the loan that you then had with Mr. Gravet—was later reduced to writing?

A. Not so far as I recall, other than the writing that took place in entries on the company's records and so on. There was never any note given for the loan or anything like that, if that is what you mean.

Q. Wasn't there a letter written and delivered to Mr. Gravet on September 8th setting forth the loan arrangement?

A. Yes; but I don't believe that that was a document that was executed by Mr. Gravet. I misunderstood your question, then. There was later a letter explaining how the whole transaction had been handled. But I misunderstood what you meant when you asked me if the loan ar-

(Testimony of Leon Levi)

rangement was reduced to writing. I thought you meant in a bilateral agreement.

Q. I hand you a photostat which was furnished the revenue agent last August, purporting to be a copy of a letter on the stationary of Metro-Goldwyn-Mayer Pictures, dated September 8, 1938, addressed to "Mr. Fernand Gravet" and signed "Loew's Incorporated by E. J. Mannix," and ask [153] you whether you are familiar with this letter, the original of this letter or the office copy?

A. Yes; I am.

Q. Did you assist in wording or drafting that letter?

A. I think I probably drafted it, as a matter of fact. I notice it bears initials down in the corner here that could very well be mine and the language sounds a little bit as though it were mine.

Q. Was that delivered to Mr. Gravet?

A. That was delivered to Mr. Gravet.

Q. To your knowledge?

A. Yes.

Q. By whom?

A. I am almost positive that I delivered it to him myself.

Q. The date it bears or the following day or when?

A. No. No; I think it probably was a few days later.

Mr. Mitchell: We ask that this copy—by the way, who is Mr. Mannix whose name appears there?

A. He is one of the chief executive officers out at the studio.

Mr. Mitchell: We ask that this be marked for identification.

The Court: Very well.

(Testimony of Leon Levi)

The Clerk: A for identification.

(The document referred to was marked Defendant's Exhibit A, for identification.) [154]

The Court: Don't you want it in evidence now? There is no objection.

Mr. Zeitzius: None whatsoever if counsel wants it. I have no objection.

Mr. Mitchell: Has counsel another copy of it? That is the only copy I have.

Mr. Zeitzius: Yes; I have a copy. [155]

* * * * *

The Court: All right; Exhibit A.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

[DEFENDANT'S EXHIBIT A]

COPY

METRO-GOLDWYN-MAYER PICTURES

Culver City

California

September 8, 1938.

Mr. Fernand Gravet

Westwood Ambassador Apartments

Wilshire Boulevard

West Los Angeles, California

Dear Sir:

We are writing this letter to confirm certain arrangements which now exist between us so that there will be no chance of any misunderstanding.

(Defendant's Exhibit A)

On September 7, 1938, we advanced to you the sum of \$37,073.27 for your use in payment of Federal income taxes. Heretofore, on June 21, 1938, we advanced you the sum of \$3,245.92 for your use in payment of Federal income taxes which were then to be paid by your wife. In each instance these sums so paid by us to you were treated by us as loans for your account.

We realize, of course, that ultimately we will be required as a part of our contractual liability to you to pay certain of your taxes as set forth in our agreements with you. Nevertheless, our exact liability cannot be determined at the present time, and in all probability will not be determinable at least until after the end of this calendar year.

As stated above, our records now disclose that you are indebted to us in the sum of \$40,319.19, being the total of the two payments above referred to. As soon as the exact amount of our liability to you under our agreements can be determined we will credit your indebtedness with the amount of such liability, and if there is any excess then owing from you to us we will, of course, expect you to refund the same to us. We agree, however, that we will not make any demand upon you for payment of any portion of this in- [186] debtedness until after such time as the proper amount of our liability for your taxes has been determined.

Very truly yours,

LOEW'S INCORPORATED

By E. J. MANNIX

LL:nt

(Defendant's Exhibit A)

I hereby certify that the foregoing instrument is a correct copy of the original.

Dated: August 4, 1943.

[Seal]

ElLOWENE EVANS

Notary Public in and for the County of Los Angeles
State of California

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Deft. Exhibit A. Date 3/31/44. No. A Identification. Date 3/31/44. No. A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [187]

Q. By Mr. Mitchell: At whose suggestion, if any, was this Government's Exhibit A drafted by you, Mr. Levi?

A. I think probably at my own suggestion. I wanted to have a written record that would confirm what had happened.

Q. I see. Did you deliver this or mail it to Mr. Gravet?

A. Well, I have already stated I think I delivered it. I think I personally handed it to him, but I am not certain of that.

Q. You were examined on direct examination concerning exhibits 1 and 2 which purport to be portions of the contract of July 29, 1938. Did you prepare those two letters, Plaintiffs' Exhibit 1 and 2?

A. No. I would not have prepared them. I personally might have been responsible for some of the language that appears in the tax clause.

(Testimony of Leon Levi)

Q. In the tax clause, Exhibit 2?

A. Yes; paragraph 1 of Exhibit 2, I think it is, or [157] maybe even the whole agreement. I undoubtedly was called on to approve it before it was sent out, because it was routine in our office that any clause like that pertaining to taxes had to be approved by me before it was sent out.

Q. That is, in Loeb & Loeb's office? A. Yes.

Q. Do you know who prepared these two, who had active charge of drafting them on behalf of Loeb & Loeb?

A. If I can see that, maybe I can tell.

Mr. Zeitzius: Suppose I hand you the originals. The photostats, I believe, are in evidence.

Mr. Mitchell: Very well.

The Court: All right.

Q. By Mr. Mitchell: Do the originals bear any initials, Mr. Levi?

A. Why, up at the very top of the page there is a date.

Q. On Exhibit 1 or 2? A. On both.

Q. Oh.

A. There is a date on Exhibit 1. It says "7-27-38 C. W." which I believe would mean that Mr. George Cohn of Loeb & Loeb did the dictating and his secretary, Miss Whittington, transcribed it; and the same, but with the exception of the date "7-29-38" appears on Exhibit 2.

Q. Do you know who passed on these two documents, [158] Exhibits 1 and 2, if anyone, for Mr. Gravet? Was it Mrs. Schulburg or her attorney?

A. Mrs. Schulburg was his agent and she—

(Testimony of Leon Levi)

Q. His business agent?

A. Yes. She undoubtedly passes on them, and whether she consulted anyone else or not I couldn't tell you. The original contract that he had, I understand, she wrote herself, so she may have answered—

Q. What original contract do you refer to?

A. Well, I think I was thinking of the Dario case, the other case I referred to. She was the agent in that, too, but she sometimes tried her hand at writing these things herself. So I couldn't tell you whether she had anyone else pass of it or not.

Q. She was the business agent but she was an attorney?

A. Not that I know of.

Mr. Mitchell: Exhibit 1, paragraphs 3 and 4, refer to an Exhibit A attached to Exhibit 1. I will ask counsel now to produce the Exhibit A that was attached to Exhibit 1.

Mr. Zeitzius: This is our only copy.

Mr. Mitchell: I do not want to encumber the record, your Honor. This is a document I have never seen, and if I may be permitted to examine it over the noon hour?

Mr. Zeitzius: Very well.

Mr. Mitchell: To determine whether I think it material at all, I might save encumbering the record. [159]

The Court: Is this Exhibit A of the statement of facts?

Mr. Mitchell: No, your Honor: Exhibit A attached to Plaintiffs' Exhibit 1, referred to in Exhibit 1, paragraph 4.

Mr. Zeitzius: May I make a statement that may aid?

The Court: Yes.

(Testimony of Leon Levi)

Mr. Zeitzius: That was an offer to enter into another contract with Gravet to commence in the future, giving him a time limit, I think, to October 15 in which to accept it, and therefore it was merely attached to this contract as an offer. It was not a part of the contract or the purpose of this suit.

The Court: It might be.

Mr. Mitchell: It is part of the *res gestae* and it may be very material.

The Court: Yes. It might bear upon future intentions. It might work both ways.

Mr. Zeitzius: With that view—

The Court: It might lend itself to an argument that strengthens the position that he intended to come back because he had an option to renew the contract.

Mr. Zeitzius: Yes. Well, I will see to it.

The Court: It might lend itself to the other one, that he threw it away and tried to dig it up. So therefore, in other words, it has a bearing upon the issue. I have not seen it because it is not attached. If you are not offering it now, it is all right. [160]

Mr. Mitchell: No, your Honor. I would like to look it over during the noon hour.

The Court: All right. So long as you get through with this witness, you may take your time to look it over.

Mr. Mitchell: All right.

Q. Do you recall, Mr. Levi, having seen the so-called Mervyn LeRoy contract referred to in paragraph 1 of Plaintiffs' Exhibit 1 in this case, a contract described as being dated May 6, 1936, between LeRoy and Mr. Gravet?

A. Yes; I undoubtedly saw that.

(Testimony of Leon Levi)

Mr. Mitchell: We also demand production of that, because Exhibit 1 is a supplement or an amendment of the LeRoy contract.

The Court: All right.

Mr. Mitchell: And we will ask that we be permitted to look over it during the recess.

The Court: All right.

Mr. Zeitzius: This is the only copy. It is an unsigned copy, except that in pencil someone has written the names Gravet, I believe, but it is not in Gravet's handwriting.

Mr. Mitchell: Very well.

Q. Oh, Mr. Levi, do you know whether or not Mr. Gravet exercised the option referred to in paragraph 4 of Exhibit 1?

A. That is the option to take up that other employment contract? [161]

Q. That is right.

A. So far as I know, he did not. I would not be the person who would have the best knowledge of it.

Q. I believe we stipulate that Mr. Gravet never returned to the United States after September 7, in the stipulation of facts.

A. Yes. That I know for a fact, but whether he had exercised or not exercised his option I am not certain.

Q. You don't know?

A. I don't think he did.

Q. Do you know whether or not "The Great Waltz" was dubbed into French?

A. No; I couldn't answer that.

Q. As referred to in paragraph 3 of Plaintiffs' Exhibit 1, for French distribution, "Dubbing shall be per-

(Testimony of Leon Levi)

formed between October 15, 1938, and December 15, 1938”?

A. I could not answer that. That work would have been over in France, so it would not necessarily involve his coming back here. But I don't know whether they did it or not.

The Court: Sometimes they dub it in by just having the French voices do the talking in the same country to which the language relates?

A. This agreement, I think, your Honor, provided that he should do it, and if he was in France at the time the work was to be done, in France. [162]

The Court: All right.

Q. By Mr. Mitchell: Mr. Levi, you also attended conferences before the conference bureau of Internal Revenue, or before the conferee, according to the evidence that is here, you and Mr. Keesling, and also appeared at an informal conference before the technical staff subsequently, pursuant to request that the taxpayers be given a hearing before the technical staff?

A. Mr. Mitchell, to the best of my recollection I was not present at either of those conferences.

* * * * *

The Witness: I am named in the power of attorney.

Q. What is that?

A. I say, I think my name appears on the power of attorney, but I do not believe I attended the conferences. I think Mr. Keesling handled those by himself. I have no recollection of having been at those conferences.

* * * * *

(Testimony of Leon Levi)

Q. Then, you did not appear at either conference?

A. I don't think I did. [163]

* * * * *

Q. By Mr. Mitchell: Conferences before the Revenue Agent and before the technical staff subsequent to the refund claim.

A. I was not at those conferences.

Q. You were not there. Didn't you refer to a power of attorney?

A. I said I may be named in the power of attorney. I am quite sure Frank Keesling attended those conferences, and it was our general practice that anytime Frank Keesling was named in a power of attorney—he worked in my department; I was the head of the tax department and he worked in the tax department—and it was our custom to always have my name appear on the power of attorney so that if your files disclose that it was a power of attorney in favor of Frank Keesling, you will probably find my name is also on it. And I don't think I attended the conferences. I have no recollection attending them. I do not even know the dates on which they were held. [164]

Q. I hand you, Mr. Levi, two certified copies of two what purport to be substitutions of Mr. Keesling and Mr. Levi as attorneys in fact for Fernand and for Victorine Mertens, signed by J. R. White, a substitution of attorney in fact, and ask you whether those refresh your recollection as to whether or not you became attorney in fact for the taxpayers on the 20th of December, 1940?

A. No; it does not refresh my recollection at all. I have already stated that if Mr. Keesling was named in a power of attorney, I was undoubtedly named along with him, and these are simply those powers of attorney.

(Testimony of Leon Levi)

Mr. Mitchell: We offer these into evidence.

The Court: All right; they may be received.

Mr. Mitchell: Any objection, Mr. Zeitzius?

Mr. Zeitzius: None whatsoever.

Mr. Mitchell: As Government's Exhibits B and C, respectively.

The Court: All right.

Mr. Mitchell: B, Fernand Mertens, and C, Victorine.

The Court: What is the date of those, Mr. Mitchell?

Mr. Mitchell: December, 1940.

(The documents referred to were marked Defendant's Exhibits B and C, respectively, and were received in evidence.)

[DEFENDANT'S EXHIBIT B]

* * * * *

State of California)
) ss
County of Los Angeles)

SUBSTITUTION OF ATTORNEY IN FACT

Be it known that I, J. R. White of Messrs. Price, Waterhouse & Co., and resident of Glendale, California, by virtue of the power and authority to me given in and by the letters or powers of attorney of Fernand Mertens to represent him as his true and lawful agent and attorney in fact, to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United States and to represent him in all matters pertaining to the Federal tax returns filed by him and to do and perform all and every act and thing whatsoever requisite and

(Defendant's Exhibit B)

necessary to be done in the premises, do hereby substitute and appoint Leon Levi and/or Frank Keesling of Messrs. Loeb & Loeb to do, perform and execute every act and thing which I might or could do as the attorney in fact of Fernand Mertens, hereby ratifying and confirming all that the said attorney herein made and appointed shall do in the premises by virtue hereof and of the said letters or powers of attorney.

Witness my hand at Los Angeles this 20th day of December 1940.

J. R. White

Subscribed and sworn to before me this 20th day of December 1940.

[Seal]

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires November 18, 1943.

This is to certify that neither Loeb & Loeb nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Fernand Mertens in the matter of Federal income taxes.

LOEB & LOEB

By Leon H. Levi

Joseph P. Loeb

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Deft. Exhibit B. Date 3/31/44. No. B in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [189]

[DEFENDANT'S EXHIBIT C]

* * * * *

State of California)
) ss
 County of Los Angeles)

SUBSTITUTION OF ATTORNEY IN FACT

Be it known that I, J. R. White of Messrs. Price, Waterhouse & Co., and resident of Glendale, California, by virtue of the power and authority to me given in and by the letters or powers of attorney of Victorine Catherine Renourd Mertens to represent her as her true and lawful agent and attorney in fact, to appear before the Bureau of Internal Revenue of the Treasury Department of the Government of the United States and to represent her in all matters pertaining to the Federal tax returns filed by her and to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises, do hereby substitute and appoint Leon Levi and/or Frank Keesling of Messrs. Loeb & Loeb to do, perform and execute every act and thing which I might or could do as the attorney in fact of Victorine Catherine Renourd Mertens, hereby ratifying and confirming all that the said attorney herein made and appointed shall do in the premises by virtue hereof and of the said letters or powers of attorney.

Witness my hand at Los Angeles this 20th day of December 1940.

J. R. White

(Defendant's Exhibit C)

Subscribed and sworn to before me this 20th day of December 1940.

[Seal]

Elsie Evershed

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires November 18, 1943.

This is to certify that neither Loeb & Loeb nor any of its members or employees, including those mentioned in this power of attorney, have entered into a contingent or partially contingent fee arrangement for the representation before the Treasury Department of Victorine Catherine Renourd Mertens in the matter of Federal income taxes.

LOEB & LOEB

By Leon H. Levi

Joseph P. Loeb

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Deft. Exhibit C. Date 3/31/44. No. C in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [191]

Q. You do not recall, do you, Mr. Levi, the occasion of this substitution of attorneys in fact or how the [165] substitution happened to be made?

A. I can't say that I recall. I think I know how it happened to be made. I think I probably know.

Q. If you know, I will ask you.

A. Mr. White made the substitutions, so he probably remembers better about it than I do. But I assume that it was done in order that Mr. Keesling could appear with

(Testimony of Leon Levi)

Mr. White and on behalf of Mr. White at the hearing before the Revenue Agent on the refund claims.

Q. Did you assist in preparing the refund claims?

A. No; I did not.

Q. Did Mr. Keesling?

A. No. I think they were shown to me before they were sent out to Mr. and Mrs. Gravet for signing, but I had no part in the preparation of them. That was done entirely in the office of Price-Waterhouse, and at the time that these powers of attorney bear, at the date they bear, Mr. Mitchell, it was December, 1940.

Q. The substitution was late in December, 1940?

A. The substitutions, late in December, 1940. I was then getting ready—in fact, I think I was already out of the city, but if I was not already out, I was just preparing to leave the city for a five or six months' trip. So I know nothing about those.

The Court: The exact date is December 20, 1940, on both substitutions, which are Exhibits B and C. [166]

Mr. Mitchell: Very well.

Mr. Zeitzius: Might I just interject something here? Will counsel agree that the powers of attorney are necessary to present to the Agent's Office, to the technical staff, as a condition precedent to appearing at a hearing pursuant to any written invitation coming from that office?

Mr. Mitchell: Oh, yes; so stipulated. That is the practice, and, in fact, a requirement of the department.

* * * * *

The Court: All right.

Q. By Mr. Mitchell: Mr. Levi, I call your attention to the signatures on the certificate at the bottom of each

(Testimony of Leon Levi)

of the Government's Exhibits B and C, signed, "Loeb & Loeb by Leon H. Levi" and the signature of "Joseph P. Loeb." Do you recognize the handwriting? Is that **your** signature?

A. Yes; that is my signature and that is Mr. Loeb's signature.

Q. Mr. Loeb's signature.

A. This was December, 1940. That was before I was a [167] partner in the firm and it was our custom to always have the employee's signature verified by a partner.

Q. That applies to both B and C?

A. Yes. [168]

* * * * *

J. R. WHITE,

recalled as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

(Resumed.)

The Court: All right. Let us go on.

Mr. Zeitzius: Mr. White, the witness, has handed me typewritten paper marked Exhibit 19 for identification. Will the clerk please stamp it?

(The document referred to was marked Plaintiffs' Exhibit 19, for identification.)

Q. By Mr. Zeitzius: I hand you what has been marked for identification as Plaintiffs' Exhibit No. 19. Will you state briefly what it is?

(Testimony of J. R. White)

A. This is a presentation of the tax calculations about which I spoke this morning and which I was asked to have typed in a readable form.

Mr. Zeitzius: I offer it into evidence and hand it to your Honor.

Mr. Mitchell: There is no objection. I think the witness was also going to have typed up the computation that was originally submitted to the Collector's Office and rejected by the Collector's Office on or about the 25th of August, 1938. [169]

The Witness: I have here the document I took to the Collector's Office on that day.

Q. By Mr. Zeitzius: Did you submit the document?

A. And which I left with them, and probably they have it or a copy of it, and which has the certain changes in my handwriting.

Mr. Mitchell: May I look at that? That is two pages. Will the witness prepare this in the same form as the other that has been identified?

A. I can make a copy of this, because that is prepared in the same form, you will notice, as the schedule that was sent in our letter of September 7th and which is attached to the returns, the difference being that in the one attached to the returns the item of \$40,000 is included in a column. The gratuities to the studio employees are eliminated and the deduction for medical and skin treatments has been reduced by \$775.15.

Mr. Mitchell: I have no objection to those original working notes going in, but I would like to have either this or a copy of it as a part of Exhibit 19.

The Witness: I would like, of course, to have those back eventually, and I will have copies made.

(Testimony of J. R. White)

Mr. Mitchell: They can be furnished tomorrow morning?

The Witness: Yes.

Mr. Mitchell: Very well. [170]

* * * * *

Cross-Examination

By Mr. Mitchell:

The Clerk: Will that be marked for identification for the government when it comes, or for the defendant?

Mr. Zeitzius: Mr. Mitchell requested it. We have no objection to it going in, with the witness' explanation, as he explained it.

* * * * *

The Clerk: That will be Defendant's D for identification when it is received.

Mr. Mitchell: Before the noon recess counsel handed to me the original Mervyn LeRoy agreement, a copy of the original Mervyn LeRoy agreement, dated 6th of May, 1936, [171] of which Plaintiffs' Exhibits 1 and 2 are amendatory and supplemental, which agreement, according to Exhibit 1, was assigned to Loew's Incorporated by the employer, Mervyn LeRoy; also, Exhibit A, a document that is attached to Plaintiffs' Exhibit 1 and referred to therein as Exhibit A, a contract, a proposed contract between Loew's Incorporated and the Plaintiff, Mr. Gravet, in which Mr. Gravet had the option under Exhibit 1 of exercising on or before the 15th of October, 1938. Will counsel stipulate that the option was not exercised?

Mr. Zeitzius: My best information is that that is correct, and I will therefore so stipulate. But I want to suggest that counsel's statement,—I think he agrees with

(Testimony of J. R. White)

me—that this paper which he just described is an offer to enter into a contract and, at the same time, it is the form of contract which would be signed if the offer were accepted.

Mr. Mitchell: I think that is correct. It is a part of Exhibit A, expressly made a part of Exhibit A.

Mr. Zeitzius: Of the agreement of July 29th.

Mr. Mitchell: I mean Exhibit 1.

Mr. Zeitzius: That is right.

Mr. Mitchell: Plaintiffs' Exhibit 1.

If the Court please, during the noon hour I have gone over these two documents that were handed to me by Plaintiffs' counsel and find several provisions contained in them that I think should go into the record, and therefore suggest that [172] those portions be read into the record rather than encumbering the record with the complete document, if that is satisfactory to counsel and the Court.

The Court: All right; go ahead.

Mr. Zeitzius: I would like to see the provisions first.

Mr. Mitchell: Counsel prefers that the whole document go in.

* * * * *

The Court: Very well. Mark it all for identification and then mark off the portions you want in, and then if they [173] want any part, they can offer that.

Mr. Zeitzius: May we have it back, then?

Mr. Mitchell: Surely.

Mr. Zeitzius: We will substitute a copy of it.

Mr. Mitchell: All right.

The Clerk: That will be Exhibit E for identification.

(Testimony of J. R. White)

(The document referred to was marked Defendant's Exhibit E, for identification.)

Mr. Mitchell: Defendant's Exhibit E for identification purports to be an agreement between Mervyn LeRoy of Hollywood, California, employer and first party, and Mr. Fernand Gravey of St. Cloud (Seine), France, hereinafter called 'Artist,' second party. The portions which the government desires to read into the record—

Mr. Zeitzius: Dated May 6th, Mr. Mitchell, 1936.

Mr. Mitchell: Dated May 6th, 1936. Correct.

The government desires to read that portion of paragraph 8 appearing on page 5 as follows:

* * * * *

Skipping now into paragraph 17, beginning on page 8:
Paragraph 17. [174]

* * * * *

Then, a portion of paragraph 18, appearing on page 9, [175] reading as follows:

* * * * *

Then, paragraph 20, beginning on page 9 and ending on page 10, reading as follows: Paragraph 20.

* * * * *

Now, we will ask, then, that the same thing be done in [176] respect of the document that is referred to in Plaintiffs' Exhibit 1 as Exhibit A, a proposed contract between Loew's Incorporated and Fernand Gravet.

Mr. Zeitzius: Have you had it marked for identification?

Mr. Mitchell: We will ask that this also be marked as Defendant's Exhibit F.

(Testimony of J. R. White)

The Clerk: F for identification.

(The document referred to was marked Defendant's Exhibit F, for identification.)

Mr. Zeitzius: And may it be returned to the Plaintiffs?

Mr. Mitchell: The portions of Defendant's Exhibit F for identification which defendant desires to read into the record are as follows: Page 3, a portion of paragraph 3, reading as follows:

"The producer agrees"—

I had better read the caption, however, on the top of page 1.

* * * * *

Mr. Zeitzius: May I interpose here that this statement just read is not indicative that that was ever executed, being understood that this is the offer or proposal Mr. Mitchell referred to a few moments ago. [177]

Mr. Mitchell: As not having been exercised.

The Court: Yes.

Mr. Mitchell: That is the understanding. That is correct, your Honor.

Reading, then, from page 3, a portion of paragraph 3 near the top of the page, as follows: [178]

* * * * *

Now, reading from page 4—no. Now reading from

* * * * *

page 5, a portion of paragraph 5: [179]

* * * * *

(Testimony of J. R. White)

Now reading paragraph 7 of the agreement, which begins on page 6 and ends on page 6a: Paragraph 7. [180]

* * * * *

Then, reading paragraph 19, which begins on page 17 and ends on page 17a: [181]

* * * * *

Now I have very little more, just two more portions. Now reading from the first sentence of paragraph 22, which appears at the top of page 18:

* * * * *

Then reading a portion of the first sentence of paragraph 23, on the same page 18: [183]

* * * * *

That is all that the government desires to read from those two documents.

Mr. Zeitzius: I would like to offer both of them in evidence.

The Court: All right; they may be received in evidence and you may, as part of your argument, call my attention to any other clause or clauses you want. As I understand, this was an option that he might exercise.

Mr. Zeitzius: That is right; it is an offer.

The Court: These are conditions to deal in the future.

Mr. Mitchell: That is right.

The Court: And offered merely—

Mr. Zeitzius: As a proposed contract.

The Court: —These proposals that the people contemplate, as bearing in mind in the future what their relationship might be if they exercised the option.

(Testimony of J. R. White)

Mr. Mitchell: That is the second one from which I read. The first one is the original LeRoy contract.

The Clerk: E for identification will be marked Plaintiffs' Exhibit 20 and F will be marked Plaintiffs' Exhibit 21.

The Court: All right.

(The documents referred to were marked Plaintiffs' Exhibits 20 and 21, in evidence.) [184]

[PLAINTIFFS' EXHIBIT 20]

THIS AGREEMENT made this Sixth day of May 1936 between Mr. MERVYN LE ROY of Hollywood (California) hereinafter called "EMPLOYER", party of the first part, and Mr. FERNAND GRAVEY of St. Cloud (Seine), France, hereinafter called "ARTIST", party of the second part,

WITNESSETH:

Whereas Employer is engaged in the business of producing motion pictures, and

Whereas services of Artist are of a unique and unusual character which gives them particular value and which services Employer desires to acquire,

Now, Therefore, for and in consideration of the mutual covenants and agreements hereinafter set forth, it is agreed between the parties as follows, to-wit:—

- 1) Employer hereby engages Artist and Artist agrees to
english
render his services as an actor for two Δ pictures during the

(Plaintiffs' Exhibit 20)

period starting on November 15th, 1936, and ending on November 14th, 1937. [137]

* * * * *

8) In consideration of the aforementioned Employer agrees to pay Artist the sum of \$30,000.—(Thirty thousand Dollars) for each picture, which sum is to be paid pro rata temporis, i. e. at the rate of \$3,500.—(Three thousand five hundred Dollars) a week for each of every one of the eight weeks.

Artist has the right to terminate work immediately in the event that he should not receive his payment regularly.

Employer agrees furthermore to furnish Artist and an accompanying person with first class passage and railroad round trip tickets from Paris (France) to Hollywood (California).

Employer furthermore agrees to pay all taxes which Artist may be assessed in the United States, but not his taxes in France, and only for such sums which Artist derives from his employment through Employer. [141]

Artist agrees that Employer pay 10% (ten per cent) of any sums due to him as salary directly to his agent Mrs. Adeline Schulberg and that for the relations between Artist and Employer such payments shall be deemed as to have been made to Artist. [143]

* * * * *

17) Artist hereby grants to Employer an option for his further services for additional four years after the expiration of this contract, viz. for the time beginning November 15th, 1937 and ending October 14th, 1941, for additional three motion pictures a year under the same

(Plaintiffs' Exhibit 20)

terms and conditions as those cited herein except that the consideration for such further performances shall be \$35,000.—(Thirty-five thousand Dollars), \$40,000.—(Forty-thousand Dollars) and \$45,000.—(Forty-five thousand Dollars) for the first year, \$50,000.—(Fifty thousand Dollars) each in the second year, \$60,000.—(Sixty-thousand Dollars) each in the third year and \$75,000.— [144] (Seventy-five thousand Dollars) each in the fourth year.

The option, which must be exercised from year to year, is to be lifted by Employer by way of sending Artist a registered letter to that effect not later than sixty days before the expiration of the previous contract. This letter is to be addressed to the last address designated by Artist and if no address has been designated to No 2 rue de Buzenval St. Cloud (Seine) France, and shall be deemed as having been given in time if it has been posted before the commencement of that period of sixty days, i. e. it must have been posted not later than September 15th of each year.

18) Artist may refuse to accept the option, but in this event he may not make an English speaking motion picture for any firm, person or corporation before November 15th, 1941.

* * * * *

20) Should any dispute or controversy arise between the parties hereto with reference to this contract or the employment herein provided for, such dispute or controversy shall be referred for determination to a committee consisting of five foundation members of the Actor's Branch of the Academy of Motion Picture Arts and Sciences,

(Plaintiffs' Exhibit 20)

which committee is to be selected by the Executive Committee of the Actor's Branch of said Academy of Motion Picture Arts and Sciences. Either party to such arbitration may appeal from the decision rendered by such [145] committee, and in such event the dispute or controversy between the parties hereto shall be determined by the Conciliation Committee of said Academy of Motion Picture Arts and Sciences. Any arbitration hereunder shall be conducted in accordance with the by-laws of said Academy of Motion Picture Arts and Sciences, and in accordance with such rules as may from time to time be formulated by said Academy of Motion Picture Arts and Sciences.

* * * * *

[Endorsed]: Case No. 3002. Mertens vs. Rogan et al. Pltf. Exhibit 20. Date 3/31/44. No. 20 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [146]

* * * * *

Mr. Mitchell: Copies may be substituted for the originals; no objection.

The Court: All right; go ahead.

Q. By Mr. Mitchell: Mr. White, I believe you testified yesterday that Mr. Melbourne went with you in June, 1938, and paid the tax reported in Mrs. Mertens' return; is that correct, in June, 1938?

A. Yes; that, I believe, is.

Q. Mr. Melbourne is with Loew's Incorporated?

A. Mr. Melbourne was an employee of Loew's Incorporated and he handled the tax and insurance matters for that corporation.

(Testimony of J. R. White)

Q. And who else was with you at that time besides Mr. Melbourne and Mr. Mertens?

A. Mrs. Mertens, Mrs. Schulburg, who was Mr. Mertens' agent. The time of the payment I don't remember whether Mr. McDonald went down to the cashier's window with us or whether Mr. Ogden did, one of the two did.

Q. Was the question discussed then as to whether or not the tax should be paid on that particular payment by Loew's Incorporated, of the \$3,000 some odd dollars that were then paid to procure Mrs. Mertens' sailing permit?

A. There was no question but that Loew's was to [185] furnish the money and I am sure—I don't know that they did, but I believe they furnished the money to Mr. Melbourne.

Q. Was anything said at the time of your conference with Mr. Ogden or Mr. McDonald, deputy collectors, concerning the approaching or then controversy as to whether or not that tax payment should be included in the income of Mr. and Mrs. Mertens for that particular period?

Mr. Zeitzius: May I ask whether you mean the \$3,200 item?

Mr. Mitchell: The \$3,000 some odd dollars that was paid by Mr. Melbourne to the cashier in June, 1938.

The Witness: Am I free to answer?

The Court: Yes.

The Witness: Would you mind reading the question, please?

The Court: Read the question please, Mr. Bargion.
(Question read by the reporter.)

A. No.

(Testimony of J. R. White)

Q. By Mr. Mitchell: And it was not then included in your return?

A. That is correct; it was not then included.

Q. It was not included in the return of June, Exhibit 3 in this case?

A. I do not remember the exhibit number, but it was not included in the information on which Mrs. Mertens' sailing permit was issued, and there was no tax added to [186] the income on which her sailing permit was issued.

Q. Did you hear Mr. Levi testify this morning that he was introduced to Mr. Mertens sometime in about August, 1938?

A. Yes; I did.

Q. Did you make the introduction?

A. No; I didn't make the introduction.

Q. Were you present? Do you know where that introduction took place?

A. No. I was with Mr. Levi at one time when we were both introduced to Mr. Gravet, but I had met him before and I thought at the time that Mr. Levi had met him before. I assumed that he had.

Q. During your conversations with Mr. Mertens or Mrs. Mertens in June was the subject of their 1937 tax returns discussed?

A. Yes; it was.

Q. What, if anything, was stated in that regard?

A. The conversation was held at Mr. McDonald's desk in the Collector's Office and Mr. McDonald referred to a—I believe it was a card index record which showed that Mr. and Mrs. Mertens had been in the country before. My recollection is that he told me that the card record showed that he had been in the country before and that they had been issued sailing permits before, or departure

(Testimony of J. R. White)

permits, when they left the country, and at that time they were taxed [187] as non-resident aliens because they had come in under what is known as the visitors permits.

Q. I see.

The Court: Go ahead.

A. I think also that there was discussion with them that they had left the country so as to come back in under the quota, which I believe has to be done.

Q. By Mr. Mitchell: You did not receive your power of attorney from Mrs. Mertens until the 24th of June, is that correct?

A. I don't have a record of the date it was received, but the power of attorney I have shows that it was executed on the 24th of June, 1938.

Q. And it was in pursuance of that power of attorney that you appeared for Mrs. Mertens at the Collector's Office on that occasion?

A. It is my understanding and it was my understanding at the time that a power of attorney was not required for a person to assist a taxpayer in filing a return or securing a sailing permit, but that the Collector's Office will talk to anyone, whether they have a power of attorney or not. This power of attorney—these powers of attorney from Mr. and Mrs. Mertens were secured at that time so that I or other representatives of Price-Waterhouse would be able to discuss these tax cases with the Treasury Department.

Q. You anticipated that there might be a controversy [188] at that time, did you not?

A. Yes; we anticipated there might be a controversy.

Q. And you wanted a power of attorney to be prepared for that?

(Testimony of J. R. White)

A. We wanted—in all tax cases where we represent or appear before the Treasury Department for taxpayers we are required to have a power of attorney, whether we do anything under it or not.

Q. Mr. White, on December 20, 1940, the evidence shows that you surrendered, or, rather, transferred your power of attorney under the substitution clause to Mr. Levi and Mr. Keesling.

Mr. Zeitzius: May I interrupt? Does counsel mean that the evidence shows he surrendered it, or merely appointed him?

Mr. Mitchell: Transferred it.

Mr. Zeitzius: No. I don't place that construction on it.

The Court: A substitution of attorneys.

Mr. Mitchell: A substitution is what I mean.

The Court: That is what they call it. All right.

A. At or about that time there was to be a conference with the Treasury Department on this matter at which—

Q. By Mr. Mitchell: About what time, the date of the substitution?

A. At or about December, 1940. I have forgotten the exact date of the conference, but there was to be a conference [189] with the Treasury Department on these matters, and Mr. Keesling or Mr. Levi were to attend the conference with me, and in order to do so they had to have some evidence of authorization and, as is the practice in these cases, why, when that is needed a substitution of attorney in fact was filed, and after that has been filed the Treasury Department will allow a person to sit into the conference and partake of the discussion.

(Testimony of J. R. White)

Q. Yes.

A. That was the sole reason for filing the substitution; and I did not regard it in this case or any other case as surrendering my rights under the power of attorney.

Q. The original power ran to three members of the firm of Price-Waterhouse and you were the only one who appointed substitutes, is that correct?

A. That is right. It ran to Mr. Sutherland, in our Washington office, and myself and Mr. Wilson who was my assistant.

Q. Who paid your compensation for services rendered in respect of the June return of Mrs. Mertens?

A. You mean my personal compensation or Price-Waterhouse?

Q. Yes; Price-Waterhouse.

A. Of course, I was employed by Price-Waterhouse at the time and I was paid by Price-Waterhouse for my services. We were engaged by Loew's Incorporated to act as independent [190] accountants in this matter in assisting the Gravets, and we were paid by—we submitted our bills and they were paid by Loew's Incorporated.

Q. And that includes all of the services that you have ever rendered in connection with this controversy, or Price-Waterhouse?

A. Excepting recently. We haven't sent them a bill since the last conference or date of the last assistance we rendered prior to this case.

Q. Was Mr. Levi present at the September 7, 1938, conference in the Collector's Office?

A. Not to the best of my recollection.

(Testimony of J. R. White)

Q. Mrs. Mertens was in France in September, 1938?

A. I don't know.

Q. She was not present in the Collector's Office?

A. I only saw Mrs. Mertens on one date.

Q. That was in June?

A. In June, at the Collector's Office; yes.

Q. Did anyone make any statement during the conference that Mrs. Mertens was not present? I notice from Plaintiffs' Exhibit 7 the return of Mrs. Mertens was signed by whom?

May I see Exhibit 7, Mr. Clerk, please?

Were you present when Plaintiffs' Exhibit 7 was executed on behalf of the taxpayer? This is the Form 1040C, departing alien return, filed in the name of Victorine Mertens. [191]

A. Yes; I was present at that time and Mr. Mertens signed it. I believe he had a power of attorney to do so.

Mr. Mitchell: I see.

Mr. Zeitzius: That was filed in September?

Mr. Mitchell: September 7th.

Mr. Zeitzius: I may not have caught it. I was thinking you were talking about June. As I understand, she herself signed the June return.

Mr. Mitchell: Oh, yes. This is Exhibit 7.

A. To answer the other part of your question, the first part of your question, everyone there assumed that she was in France in September.

Q. Will you state again who paid the cash to the cashier in the Collector's Office on September 7th? Did Mr. Melbourne make that payment at that time also?

A. Mr. Melbourne brought the cashier's checks to the Collector's Office with some cash and they were refused,

(Testimony of J. R. White)

and the telephone calls were put through and messengers were sent to the bank to get an equivalent amount of cash. I don't think the bank—the bank did not require the checks to be returned before they sent the cash. And it is my recollection, which is a little bit hazy, true, but it is my recollection that the cash was delivered to Mr. Melbourne and that he physically turned it in at the window.

Q. Do you know who sent for the messengers, which particular individual that was present at the time? Was it [192] Mr. Melbourne?

A. Yes. I think Mr. Melbourne called the studio. It is my recollection he called the studio and explained the trouble we were in and made the arrangement.

Q. And then a messenger was sent, you say, by whom? Who sent the messenger to the bank to get the cash, if you know?

A. I am sure it was someone from the accounting department, the cashier's department at Loew's.

Q. Mr. Mertens did not procure the cash, did he?

A. No. The cash was procured by Loew's I am sure.

Q. I believe you testified that you prepared the refund claims, Plaintiffs' Exhibits?

A. Yes; I prepared the refund claims.

Mr. Zeitzius: 9 and 10.

Mr. Mitchell: 9 and 10, yes; that is correct.

A. That is right; I prepared them.

Q. And prepared the schedules and other documents attached to the claims? A. Yes.

Q. When did you prepare those claims?

A. They were completed and I signed the affidavit attached to them, affidavit of preparation, on May 2nd, 1939.

(Testimony of J. R. White)

Q. And then you sent them to France to be verified by Mr. and Mrs. Mertens?

A. I believe at first they were sent to Mr. Levi for [193] his review and approval as to legal form and so forth. They involved a legal matter and we invariably, whenever any tax matter has any legal point, ask the attorneys for our clients or taxpayers to pass on them. I believe they went to Mr. Levi first.

Q. In this case you went to Mr. Levi of Loeb & Loeb?

A. That is correct.

Q. After he approved the copy, then you forwarded it to France?

A. We sent them to Mr. Mertens in France, addressed them in France on May 15, 1939.

Q. And when did you receive them back? I notice they are verified by Mr. and Mrs. Mertens on the 6th of June, 1939, before the vice consul in Paris?

A. I believe it was sometime in June, 1939.

Q. You testified yesterday also to discussions in the Revenue Office and also in the technical staff office—the Revenue Agent's office, rather, and the office of the technical staff regarding the refund claims and certain propositions being made by the Revenue Agent or the technical staff representative if the taxpayers were to concede the major issue, why, the government would concede certain items of deduction. Do you recall that testimony?

A. Yes. I don't know that I used the word "propositions." I think if I did that, the Treasury Department—

(Testimony of J. R. White)

Q. Well, the major claim. [194]

A. The Treasury Department people might object to my use of the word "proposition." But I did testify to that.

Q. That was done in connection with an endeavor of you, as representatives of the taxpayers, and the government agents, as representatives of the government, in an endeavor to settle the controversy once and for all, was it not?

A. Yes. That was an attempt to—I would say, an attempt to settle it without further controversy.

The Court: Adjust a controversy, put it that way.

A. Adjust the controversy. But, of course, we were not willing—

The Court: To concede anything.

A. —to concede anything.

Mr. Mitchell: Your major contentions—

The Court: You found there was nothing to adjust. All they wanted was to adjust the minor matters if you conceded the correctness of that application of that \$40,000?

A. That is right. And, of course, we would have conceded all of the minor matters, if they would have conceded the large ones.

The Court: If they would have conceded the others?

A. That is right.

Q. By Mr. Mitchell: These various items that were discussed in this bargaining, they did not state to you that [195] they had been investigated and verified, did they?

A. As far as the item of gratuities to the studio employees, yes. They said that it was, definitely, stated to

(Testimony of J. R. White)

me that we, of course, will allow those deductions now. As far as the medical expense for the skin and beauty treatments, or that sort of thing, they told me that they still did not allow those types of items; they considered those to be personal items.

Q. I see.

A. As to the allowance of personal exemption, why, if the tax was going to be computed for the whole year, why, yes; it would be done on that basis.

Q. In June, 1938, Mr. Mertens personally did not employ you to represent him, did he?

A. No, sir.

Mr. Zeitzius: When?

Mr. Mitchell: In June, 1938.

Q. And neither did Mrs. Mertens? A. No, sir.

Mr. Zeitzius: I move to strike out the two statements by counsel, because I think the stipulation of facts, joint Exhibit 1, clearly shows that Mr. and Mrs. Mertens, we agree, signed the powers of attorney to Mr. White on June 24, 1938; and I think that the evidence, therefore, by admission, clearly is that he was employed in June, 1938, despite counsel's remarks and the witness' answer just given. [196] I move to strike out the remarks or the questions of counsel and the answers.

Mr. Mitchell: This is cross examination if the Court please.

The Court: Well, I think it is going a little far afield. I will sustain the objection.

Q. By Mr. Mitchell: Neither Mr. nor Mrs. Mertens ever paid you anything for acting for them in June, 1938, did they? A. No, sir.

(Testimony of J. R. White)

Q. Nor at any other time? A. No, sir.

Mr. Zeitzius: I move to strike out the last two questions and answers on the ground it is immaterial and there is a presumption of law, I think, which we are entitled to rely on in that connection, unless the Court is merely allowing it as part of a broad cross examination.

The Court: I will allow it. I cannot see why when two persons are interested in the tax payment of one person and one has assumed the obligation to pay it, whether he is ever reimbursed or not, I cannot see why they can't exchange consultations or advice, or even one pay the expense of the lawyer or of the accountant, especially when the one who does it is an American corporation used to American methods and the others are French artists—not only artists, but French artists and, judging by the only English letter he [197] wrote, with a very, very, imperfect knowledge of the English language. So that in itself it does not mean anything at all. It might be that at times such a relationship might bear upon good faith of the parties, but in this particular case I do not think it is of any great importance, one way or the other.

However, I have no objection to his testifying to the fact, because I assume that in all these cases, being especially a foreign artist, they assumed the obligation. I think the government probably would kick if they did not, because, not that they are obligated to withhold, but it might probably be if they did not protect them and retain it at the source. You know, the government forced the system of retaining at the source, a voluntary system, long before we had an actual system, by merely asking for cooperation, and they got it.

(Testimony of J. R. White)

Q. By Mr. Mitchell: Mr. Ed Schulberg, I believe you testified, attempted the June 21, 1938—

* * * * *

Q. My Mr. Mitchell: I believe you stated Mrs. Schulburg attended this June 21, 1938, conference at the Collector's Office? [198]

A. That is correct.

Q. Did she appear at any of the other conferences at the Collector's Office?

A. Not that I remember.

Q. Do you know whether prior to June 24, 1938, Noel Singer, certified public accountant, then of 417 South Hill Street, Los Angeles, was Mr. Mertens' attorney in fact in tax matters?

A. As far as I know he was not.

Q. You don't know of your own knowledge?

A. I don't know of my own knowledge, except that we were never required to get a letter showing that he had been dismissed, which is the practice of the Treasury Department when a power of attorney is filed.

Q. Did you ever before this trial see the originals of Plaintiffs' Exhibits 1 and 2 which I hand you?

A. I heard Mr. Levi testify that these were exhibited to Mr. Ogden, testify this morning that these were exhibited to Mr. Ogden at our conference in August, and I assume that I saw them at that time.

Q. What is that?

A. I assume that I saw them at that time. I know that the terms—

Q. Have you any independent—

A. I know that the terms and the wording were explained to him and I know that they were explained to me,

(Testimony of J. R. White)

but I have [199] no definite recollection of having seen these before.

Q. You have no recollection of seeing them at the Collector's Office?

A. I have no definite recollection of having seen these original agreements before.

Q. Or any copies of them?

A. Or any full copies of them. I may have seen parts of them.

Q. Extracts? A. That is right.

Q. Who showed them to you?

A. Just a minute. I happened to think of something. I am incorrect. I have seen copies of those agreements and copies of those agreements were received in our office on August 9, 1938, from Mr. Levi.

Q. Sent to you by Mr. Levi?

A. Sent to us by Mr. Levi.

Q. August 9, 1938. What did you do with them?

A. August 9, 1938. I used those as a basis of preparing some estimates of the amounts of the total cost to Loew's of compliance with these agreements under various assumed circumstances, and then returned copies of the agreements to Loeb & Loeb.

Q. Did you ever before this trial see the Mervyn LeRoy contract of 1936?

A. Could I see the contract to see what it looks [200] like?

Q. Yes; here it is. It is Plaintiffs' Exhibit 20, a copy of it.

A. I think I have seen a copy of this before.

Q. When did you first see it, Mr. White?

(Testimony of J. R. White)

A. Well, it would be between June and August in 1938.

Q. Did you read it at that time?

A. I undoubtedly read the parts of it which had to do with the payment of taxes, because that information was necessary in preparing the data to be submitted to the Collector's Office. I am sure I would have read that part of it, or at least had that part explained to me.

Q. Returning to Exhibit 1, the Plaintiffs' Exhibit 1, the contract of July 29, 1938, did you ever see Exhibit A which was attached to that contract, referred to in paragraphs 3 and 4 of Exhibit 1?

A. Yes. I received that at the same time that I received a copy of the Exhibit 1.

Q. Did you read it?

A. I presume so, or at least the parts which I was required to read in order to make the computations.

Q. I believe you testified yesterday that Mr. Ogden or Mr. McDonald rejected your first computations that were submitted before August 30, 1938, and that you then wrote a letter to Loew's as to what had taken place, as I understood your testimony yesterday. How did you happen to write to [201] Loew's Incorporated? What had taken place?

A. As I testified earlier, we were engaged by Loew's Incorporated to assist Mr. Mertens in getting his sailing permit, and after we had learned the requirements of the Collector's Office as to what would have to be paid, I wrote to Loew's and told them what the requirements were so that they would have ample warning that they would have to have Mr. Gravet down at the Collector's Office on such and such a day, and that they would have to have

(Testimony of J. R. White)

present sufficient cash to pay his taxes, or the equivalent, so he could get out of the country.

Q. And did you write a similar letter at the same time to Mr. Mertens? A. No, sir.

Mr. Mitchell: May I see Exhibit 5 a moment, Mr. Clerk?

Q. Calling your attention, Mr. White, to Plaintiffs' Exhibit 5, the pages are numbered in longhand in the lower right hand corner, I call your attention to page numbered in the lower right hand corner A-4, and call your attention to an item under "Business Expenses:" with the word "Less" in front of it, evidently a list of deductions, reading:

"Commission Paid Agent \$12,437.50."

Do you find that entry? A. Yes, sir.

Q. Did Mr. Mertens tell you that the agent to whom such commission was paid was Mrs. Schulburg? [202]

A. I don't recall whether he told me that or whether she did or exactly who told me that it was.

The Court: Sometimes the contract calls for payment direct by the producer to the agent of the agent's percentage.

* * * * *

Q. You do know Mrs. Schulburg was the agent to whom that commission was paid, Mr. White?

A. She was the agent and, at our joint visit to the Collector's Office, she acted as agent and they acknowledged that she was agent; and I see I have a note in my working papers here that at that time the commission paid to her was \$4,300—no; that the commission paid to her was \$437.50 on the Warner Brothers salary.

(Testimony of J. R. White)

Q. At what time was that? [203]

A. This was in June.

Q. In June. I see.

A. And you will note that the rest of the commission of \$12,000 is 10 per cent of the \$120,000 income.

Q. Yes.

* * * * *

The Witness: I find a note here that reminds me that I told Mr. Mertens that he should file an information return, Form 1099; for Mrs. Schulburg. I see a note here that I told him that.

Mr. Mitchell: That is pretty good advice.

Q. Did you ever have any conversation with Mr. Melbourne concerning the refund claims that were filed in this case?

A. I don't recall any specifically, but there would be no necessity for that except that he would call up and ask if the claims had been filed or if they had not been filed.

Q. Your conversations in that connection were usually with Mr. Levi? A. That is correct.

Q. Now calling your attention to Exhibits 6 and 8, [204] do you know where the originals of these white photostats are, Mr. White?

A. The last I saw of the originals of these they were turned in at the window at the cashier's office.

Q. No. These are the taxpayers' copies. These are the taxpayers' copies, Mr. White, not the original returns, as you note on the back.

The Court: These are the working sheets?

Mr. Mitchell: No, your Honor. This is the notice of termination and certificate of compliance or sailing permit that is attached to the taxpayers' copy.

(Testimony of J. R. White)

A. It is my recollection that the Forms 1040C were turned in at the cashier's window.

Mr. Mitchell: That is right.

A. By Mr. Ogden, and at the time the money was paid they were stamped and that Mr. Mertens was given, probably, a small piece of paper. I think that that is true. It may have been that he was given back these, because they are photostatic copies, and I don't know where these were obtained from.

Q. You did not furnish counsel for the plaintiffs with these photostats?

A. I furnished counsel for the plaintiffs with one, a photostat of one of these returns which I had received some months back, or years back, I believe from Loeb's.

Q. Which was that? [205]

A. Oh, I did not have any of these prepared.

Q. Which one was it?

A. It was the 1040C filed by Mrs. Mertens before her departure from the country in June, 1938.

Q. Is that Plaintiffs' Exhibit 4? That is the original of Plaintiffs' Exhibit 4 which I hand you.

A. Yes; this is it. I can identify it because of it coming out of our file. I am pretty sure that is it, and the other two, you see, have never been in our file.

Q. You say you did have the original or it was furnished you?

A. No. This was furnished to us.

Q. Oh, I see, this white photostat.

A. That is right.

(Testimony of J. R. White)

Q. And then did you furnish it to counsel in this case?

A. I delivered this to counsel about 10 days before I received your subpoena.

Q. And the exhibits 3 and 4, however, you do not know where those photostats came from?

A. I don't recall ever seeing those until in court here.

Mr. Mitchell: All right. Will counsel stipulate as to the origin of these exhibits 6 and 8? I don't imagine there is any reason to hide it. I would, though, like to get in evidence the history of how they came into possession of Plaintiffs' counsel. [206]

Mr. Zeitzius: Well, you will remember that I had them with me when I discussed the stipulation with you on three different days.

Mr. Mitchell: That is right.

Mr. Zeitzius: And you and I looked them over carefully together and I extracted two of them from the office file, which I gather Mr. Levi had built up.

Mr. Mitchell: You refer to the office file of Loeb & Loeb?

Mr. Zeitzius: Of the Mertens case, of the Mertens case.

The Court: In your office?

Mr. Zeitzius: Yes; Loeb & Loeb.

The Court: Loeb and Loeb filed them.

Mr. Zeitzius: That is right. I don't know how they got there, though. In other words, I learned from Mr. Mitchell about the June return, I think, I don't know just how I learned it. In trying to get the facts, why, I had

(Testimony of J. R. White)

to get information from all sources to get the papers together.

The Court: All right, Mr. Mitchell.

Q. By Mr. Mitchell: Have you heard from Mr. Mertens since the refund claim was filed?

A. No; we haven't.

The Court: What is the date of the refund filing?

A. It was filed in 1940, I believe.

Mr. Zeitzius: March 5. [207]

* * * * *

The Witness: March 5, 1940; that is correct.

* * * * *

GEORGE A. WARREN,

called as a witness by and on behalf of the Plaintiffs and Cross-Defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zeitzius:

Q. Your name is George A. Warren?

A. That is correct, sir. [208]

Q. And your residence, please?

A. Beverly Hills, California.

Q. You are employed by whom?

A. Loew's Incorporated.

Q. For how long have you been so employed?

A. I entered the employ of Metro-Goldwyn-Mayer Corporation in the latter part of November, 1937. As of January 1, 1938, the assets and the operations of Metro-Goldwyn-Mayer Corporation were taken over by Loew's Incorporated and I have been in their employ since.

(Testimony of George A. Warren)

Q. What is your present position?

A. Chief accountant.

Q. What was your position in 1938?

A. The early part of 1938 I was—well, you might say, co-supervisor of the accounting department along with the gentleman in charge of the accounts and accounting and auditing. Mr. Newman operates the office and the office personnel.

Mr. Mitchell: If the Court please, if the only thing counsel desires to prove by this witness is that the taxes, the \$37,000, or whatever the amount is that were paid as taxes for these taxpayers in 1938, were carried on the books of Loew's Incorporated as a loan, I will so stipulate.

Mr. Zeitzius: Well, that is substantially what I want. And I would like to offer into evidence—

The Court: There should be a stipulation also that they [209] were entered on the date of the payment and were in the books kept for that purpose.

Mr. Zeitzius: That is right, I want that, too; that it was kept on a ledger sheet called the 4 B account to which loans to contract employees were posted.

The Court: All right.

Mr. Mitchell: I can't stipulate as to the date that the entry was made.

The Court: Let the copy of the ledger sheet show the date. Just identify the ledger sheet or sheets and introduce them.

Q. By Mr. Zeitzius: May I ask whether you have the ledger sheet with you? A. Yes.

Q. Covering the matter about which we are speaking here? A. Yes.

(Testimony of George A. Warren)

Mr. Zeitzius: All right. I shall ask the clerk to mark this sheet for identification, or I offer it into evidence as the ledger sheet produced by the witness, I having here a photostatic copy of it, Mr. Mitchell now looking at the copy from which it is made.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 22.

(The document referred to was marked for identification as Plaintiffs' Exhibit 22.) [210]

Mr. Zeitzius: I think we have everything that we need, your Honor, by this witness.

The Court: All right.

Mr. Zeitzius: We have that stipulation of counsel that it was posted to the 4 B account, which is a loan account.

The Court: All right, step down.

Mr. Mitchell: I have not cross examined the witness yet.

The Court: Do you want this exhibit?

Mr. Mitchell: Have you an extra copy?

Mr. Zeitzius: I have two photostats only and one is in evidence.

Cross-Examination

By Mr. Mitchell:

Q. Mr. Warren, where is the balance of Mr. Gravet's ledger account? A. The balance?

Q. Where is the rest of it?

A. This is all of it.

Q. You put nothing but—

The Court: You mean another ledger account other than the tax account? His ledger sheet shows the amounts he has drawn, chargeable against his salary.

(Testimony of George A. Warren)

The Witness: We do not carry ledger sheets. I have the copy of the vouchers where the payments were made to him. They are charged against the expenses. This is, pure and [211] simple, an accounts receivable ledger sheet.

The Court: Do you want to see those vouchers?

Mr. Mitchell: No, your Honor.

Mr. Zeitzius: We will stipulate, Mr. Mitchell, that this witness would testify and back it up with original vouchers showing that they paid the entire \$120,000 that you and I stipulated by September 14, 1938, and that in addition there was some \$1,200 in taxes paid during 1938, as shown in the schedule attached to the refund claim immediately under the \$120,000 income item, and that that is all that they show as compensation paid to Mr. Gravet on their books.

Mr. Mitchell: I am not stipulating regarding this additional item, because I do not think it is involved in the case. I do not think it is material, the additional California income tax.

Q. Mr. Warren, where are the vouchers or data from which the first item is taken, referring to Exhibit 22?

A. That is \$3,245.92?

Q. That is right.

A. It was furnished to Mr. Melbourne—I do not have the 4 C—in cash by our cashier. This is the receipt for the refund of the difference, I believe, with copy of the receipt from the Collector's Office, accounting for the \$3,245. It must have been \$3,500.

The Court: I think you had better speak a little louder.

A. It must have been \$3,500, because the sum of these [212] amounts, \$3,245 and \$255, equals \$3,500, and

(Testimony of George A. Warren)

the \$255, that is the sum which Mr. Melbourne returned to the cashier's office.

Q. By Mr. Mitchell: A certain amount was taken to the Collector's Office?

A. Taken to the Collector's Office.

Q. And it was not all necessary to be used?

A. That is correct.

Q. Which is reference "J1993." Let us take the next item, "J15" under the date September 7.

A. This is journal entry here, originally \$40,000, we drew a check to the Bank of America. This is the voucher portion of the check. I have the original check here somewhere.

Mr. Zeitzius: Here is the photostat, if it will expedite the matter.

A. In the amount of \$40,000, for which the cashier, on instructions, received a check, a cashier's check in the amount of \$17,000, another cashier's check in the amount of \$19,000, and cash to the extent of \$4,000, which were turned over to Mr. Melbourne by the cashier.

Q. By Mr. Mitchell: Will you point out to me on this—is this "J15"?

A. No. This is the voucher wherein the \$40,000 was drawn which was charged to "41-1," meaning carried in suspense until proper disposition of that item could be [213] determined.

Q. When you say "proper disposition of that item could be determined" what do you mean?

A. As to how much of it would be used, how much of it would be returned and what should be—

(Testimony of George A. Warren)

Q. How it should be entered in the books?

A. And how it should be entered in the books. Here is "J15" crediting this cash out of 41-1 and charging Fernand Gravet's 4 B which is accounts receivable.

Q. What do you mean by the stamp punched "September 7, 1938"?

A. We operate on punch-card tabulating machines. Journal entries are prepared daily, are put together at periodic intervals throughout the day, with a control total both in debits and in credits.

Q. Daily control?

A. Daily control, or in fact, at periodic intervals throughout the day, so that each batch and each card is controlled. They are sent to the tabulating department and the tabulating department punches them and punches a tabulating department card which forms the basis for our accounting. [214]

* * * * *

Q. By Mr. Mitchell: May I refer again to this "J1993" which you showed me a little while ago? Can you tell me when this entry was made, debit Fernand Gravet?

A. Actually it was made on June 28th, punched as of June 27th. Without a calendar I could not say for sure, but I am judging the way we operate, that all entries up to noon as of today reflect yesterday's work, and are punched as of yesterday, so there is a discrepancy there.

Q. By the Court: What date was that in June?

A. June 28, 1938.

Q. That was Monday? Oh, no, 1938. No; it would not be.

A. It could be any day during the week.

(Testimony of George A. Warren)

The Court: This does not go back that far.

Mr. Mitchell: Let the record show I am reading from Journal No. 1993. Let the record show that the inter-office communication dated June 27, 1938, reads as follows:

"Mr. Craig decided that we should treat the amount of tax paid for Mrs. Gravet as an advance or loan. We will also treat the taxes paid for his account when he leaves as a loan or an advance. This situation comes about because a supplementary agreement is being entered into with him making this possible, according to Leon Levi. Signed J. A."—what is that? [215]

A. An "M" that would be.

Mr. Mitchell: "J. A. M.", that is for Melbourne.

Q. What agreement was to be supplemented? Do you understand that reference?

A. That I don't know. It is possible he has reference to the agreements of—is it July 29th?

Q. July 29, 1938; yes.

The Court: All right.

Mr. Mitchell: All right. May I just look at that other September 7 journal entry?

The Witness: Surely.

Mr. Mitchell: Let the record also show that there is an endorsement on journal number 15, dated September 7, 1938, in longhand, reading as follows:

(Testimony of George A. Warren)

“Accounted for by photostatic copies of sailing permit attached to Gravet file:

Checks	\$36,000
Cash	\$1,073.27
Total	\$37,073.27
Cash Returned	\$2,926.73
Total	\$40,000.00

Receipts O.K. September 16, 1938.”

Mr. Zeitzius: May I just ask this:—

The Court: Have you completed it? Have you completed, Mr. Mitchell?

Mr. Mitchell: I think so, yes, your Honor. [216]

The Court: All right.

Mr. Zeitzius: I just have this one point, in view of the difficulty in arriving at figures. I want to ask the witness whether he knows whether the figures 40,319.19, the balance shown on Plaintiffs’ Exhibit 22 as of September 7, 1938, includes an amount of \$301.78 for taxes that were paid with respect to the French income of Gravet in 1938?

The Witness: It includes everything that was paid on September 7th or the taxes for Mr. Gravet, which would include the \$300-odd.

* * * * *

Q. By Mr. Zeitzius: This is the present state of this account? A. It’s present state.

Q. And that is the balance shown owing Loew’s Incorporated?

A. That is the balance owing Loew’s Incorporated.

Q. And still due on our books? A. Yes.

(Testimony of George A. Warren)

Mr. Mitchell: By the way, I might ask one other question, if the witness knows.

Q. By Mr. Mitchell: Have you heard from Gravet, or has Loew's Incorporated heard from Gravet since the refund [217] claim was rejected?

A. At what date was the refund claim rejected?

Mr. Zeitzius: 1941.

Mr. Mitchell: About.

The Court: I could take judicial notice that war was declared in September.

Mr. Mitchell: France was occupied from May, 1940. I believe the Court will take judicial knowledge of that.

The Court: Well, yes, but France was at war in September, 1940. In September was the invasion of Poland. I happen to remember that.

Mr. Mitchell: September 29th.

The Court: Because my children were in Paris when the war was declared.

Mr. Mitchell: And France was invaded the following May, 1940.

The Court: I know, but I mean France was in a state of war from September 5th, I think, 1940, isn't that correct?

Mr. Mitchell: September, 1939.

Mr. Zeitzius: 1939, I think.

The Court: 1939, that is right.

Mr. Zeitzius: The refund claim was rejected July 11, 1941, according to our stipulation.

Mr. Mitchell: What was your answer, Mr. Warren?

A. To the best of my knowledge, no. [218]

* * * * *

(Testimony of George A. Warren)

Mr. Zeitzius: The only thing I want to do is to offer the two assessment lists. I have nothing further.

* * * * *

Mr. Zeitzius: I first offer the assessment, a certified copy from the government of the original assessment list, signed by the Commissioner of Internal Revenue by the Acting Commissioner, at Washington, D. C., on November 4, 1938, certifying and assessing the tax of \$3,245.92, which was paid on June 21, 1938.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 23.

Mr. Mitchell: That is Exhibit what?

The Clerk: 23.

Mr. Mitchell: All right.

(The document referred to was marked Plaintiffs' Exhibit 23, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 23]

United States [Crest] of America
TREASURY DEPARTMENT
Washington

March 22, 1944.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Assessment Certificate of that portion of the July 1938 Supplemental Income Tax Assessment List—California collection district—showing an assessment of \$3,245.92 for the period from January 1, 1938 to June 30, 1938, against Victorine Mertens Renourd

(Plaintiffs' Exhibit 23)

Fernand Gravet), Los Angeles, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury.

[Seal]

F. A. Birgfeld,

F. A. Birgfeld,

Chief Clerk, Treasury Department. [180]

ASSESSMENT CERTIFICATE

[Stamped]: Internal Revenue Received Aug 8 1938
By Proving Section

6th District of California Month July Year 1938
Income Tax Division

Lists as to tax and payments compared and found to agree with sectional control ledgers.

F. F. Fichthaler,

Chief of Division

T G Albright,

Comptroller Bookkeeper.

I Hereby Certify that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names, and that the amounts thereof are as follows:

Dated at Los Angeles California

Office of Collector of Internal Revenue August 3rd,
1938

Nat Rogan

Collector of Internal Revenue

(Plaintiffs' Exhibit 23)

List	Returns	Excess	Total Tax
	Filed	Collections	
1040A Part Paid	5626	15	
1040A Full Paid	17271	09	
1040 Part Paid	284449	71	
1040 Full Paid	19702	83	
1041 Part Paid	91	70	
1041 Full Paid	3085	75	
1120 Part Paid	998173	20	
1120 Full Paid	13122	86	
Excess Profits Part Paid	10255	32	
Excess Profits Full Paid	1974	82	
All Others Part Paid	51612	35	
All Other Full Paid	70980	33	
		860	01
Totals reported by collector	1476346	11	860 01 1477206 12 * GL
Differences found by commissioner	+3,256.48		+ 3,256.48
Items reported by Commissioner			
Total Assessment	1,479,602.59	860.01	1,480,462.60

I Hereby Certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, Nov 4 1938

Milton E Carter
Acting Commissioner of Internal Revenue
Instructions

(Plaintiffs' Exhibit 23)

This form must be made each month in quadruplicate by each tax division. The original and first copy must be forwarded with the duplicate copies of the monthly lists (Form 23A) to the Commissioner within ten days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and Collections Unit within five days after the close of the month. One copy of this certificate (Form 23C) will be returned to the collector accompanied by a statement of differences on Form 23D (if errors are found), and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner. [181]

ASSESSMENT LIST.

Page No.

District 6th Calif, Income, List July 1938—Supple-
mental (Classification)

	Old				New	Re-
	Balance	Date	Debit	Credit	Balance	marks
1/1/38-6/30/38	1040-C *		3245 92	3245 92	* Form 1040C	
Victorine Mertens	⁴ Mrs				6/21/38	
Fernand Gravat/						6
10425 Wilshire Blvd	Westwood					
W. Los Angeles Calif	July 246					

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Pltí. Exhibit 23. Date 3/31/44. No. 23 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [182]

Mr. Zeitzius: I next offer a similar assessment, certified, signed by Commissioner of Internal Revenue, Guy T. Helvering, Washington, D. C., October 13, 1938, certifying to the Collector of Internal Revenue, or making, as I understand it, the assessments of the amounts that were paid on September 7, 1938, in the amounts shown on the two returns in evidence of \$17,423.88 for Mrs. Gravet and \$19,649.39 for Mr. Gravet. [220]

The Court: All right, it may be received.

The Clerk: 24 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 24, and was received in evidence.)

[PLAINTIFFS' EXHIBIT 24]

United States [Crest] of America
TREASURY DEPARTMENT
Washington

March 22, 1944.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Assessment Certificate of that portion of the September 1938 Supplemental Income Tax Assessment List—6th California collection district—showing assessments of \$17,423.88 for the period from January 1, 1938 to September 1, 1938 against Victorine Catherine Renourd Mertens (AKA—Mrs. Fernand Gravet) W. Los Angeles, California; \$19,649.39 for the period from January 1, 1938 to September 1, 1938 against Fernand Mertens (AKA—Fernand Gravet), W. Los Angeles, California, on file in this Department.

(Plaintiffs' Exhibit 24)

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

F. A. Birgfeld,

F. A. Birgfeld,

Chief Clerk, Treasury Department. [183]

ASSESSMENT CERTIFICATE

[Stamped]: Internal Revenue. Received Oct 13 1938
By Proving Section

6th District of California Month September Year 1938
Income Tax Division

Lists as to tax and payments compared and found to agree with sectional control ledgers.

F. F. Fichthaler,

F. F. Fichthaler

Chief of Division

T. G. Albright,

Comptroller ~~Bookkeeper~~

I Hereby Certify that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names, and that the amounts thereof are as follows:

Dated at Los Angeles California

Office of Collector of Internal Revenue October 5th,
1938

Nat Rogan

Collector of Internal Revenue.

(Plaintiffs' Exhibit 24)

List		Returns Filed	Excess Collections	Total Tax
1040A	Part Paid	6124	35	
1040A	Full "	44938	05	
1040	Part "	27850	56	
1040	Full "	5398	91	
1041	Part "	286	23	
1041	Full "	177	52	
1120	Part "	1238529	24	
1120	Full "	23603	90	
Excess Profits	Part "	243486	41	
"	" Full "	16383	94	
All Others	Part Paid	156265	85	
"	" Full "	16283	94	
			25406	03
Totals reported by collector		1763984	82	25406 03 1789390 85 * GL
Differences found by commissioner				
Items reported by commissioner				
Total Assessment		1,763,984.82	25,406.03	1,789,390.85

I Hereby Certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue Oct 17 1938

Guy J Hevering
Commissioner of Internal Revenue.

Instructions

This form must be made each month in quadruplicate by each tax division. The original and first copy must

(Plaintiffs' Exhibit 24)

be forwarded with the duplicate copies of the monthly lists (Form 23A) to the Commissioner within ten days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and Collections Unit within five days after the close of the month. One copy of this certificate (Form 23C) will be returned to the collector accompanied by a statement of differences on Form 23D (if errors are found), and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner. [184]

ASSESSMENT LIST.

Page No.

District 6th Calif, Income, List September 1938—Supplemental

(Classification)

	Old Balance	Date	Debit	Credit	New Balance	Re- marks
1040-C-1-1-38						
to 9-1-38 *		9/7/38	17423 88	17423 88		* 1938-
Victorine Catherine						Amended
Renourd						July
Mertens/AKA-Mrs						246-1938
Fernand Gravet/						Form
10425 Wilshire Blvd						1040C
W Los Angeles Calif						9/7/38
Sept 260						0
1040-C-1-1-38-9-1-38 *			19649 39	19649 39		* 1938-
Fernand Mertens/						Form 1040C
AKA-Fernand						9/7/38
Gravet/						1
10425 Wilshire Blvd						
W Los Angeles Calif Sept 261						

[Endorsed]: Case No. 3002. Mertens v. Rogan. Pltf. Exhibit 24. Date 3/31/44 No. 24 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [185]

The Court: Anything further, gentlemen? You do not want any of those photostats of checks that he referred to, do you, Mr. Mitchell?

Mr. Mitchell: Oh, no, your Honor.

The Court: He is prepared, I notice. He was properly instructed. He has a photostatic copy of everything.

Mr. Mitchell: I do not know whether plaintiffs rest or not.

Mr. Zeitzius: Yes.

The Court: As soon as he is through with the witness he wants to step down.

Mr. Zeitzius: Plaintiffs rest. [221]

* * * * *

Mr. Zeitzius: That is right. May I, with permission of the Court, take certain of these exhibits and have copies made?

The Court: Make arrangements with the clerk. [222]

* * * * *

Los Angeles, California, Monday, April 3, 1944.
1:00 P. M. [224]

* * * * *

Mr. Mitchell: The defendant offers into evidence a certified copy of two telegrams. The certificate reads: "They are true copies of copy of Telegram dated March 17, 1944, to Collector of Internal Revenue, Baltimore, Maryland, from Cann, deputy;" deputy commissioner; and "Telegram dated March 17, 1944," the same date, "to Commissioner of Internal Revenue, Washington, D. C., from George Hofferbert, Collector, Baltimore, Maryland, in re: Fernand Mertens or Gravet, and Victorine

Catherine Renourd Mertens, Los Angeles, California" as plaintiffs' (defendant's) next exhibit in order.

Do you want to make an objection?

The Court: Defendant's you mean. [228]

* * * * *

Mr. Mitchell: Defendant's next exhibit in order.

Mr. Zeitzius: Our objection is not based on the ground that it is hearsay or not the best evidence. We waive that objection. But we object to it as being irrelevant and immaterial. It *is* does not pertain to the issues made by the pleadings in this case. [229]

* * * * *

The Court: Why don't you stipulate? The telegrams do not go to that extent. They merely say that there are no returns. Why don't you stipulate to the fact that no returns, like the first part of your stipulation—that no returns have been found? This merely shows that there are no such returns in the files, regardless of whether they have been filed or should have been filed.

Mr. Zeitzius: I can stipulate according to the telegrams, I think.

The Court: Then, why don't you let the telegrams speak for themselves? All they say is that there are no returns for those years. If you withdraw your objection, the telegrams speak for themselves and we do not have to determine whether they should have filed any or whether they received any income.

Mr. Zeitzius: Well, with that understanding, why, I am willing that the telegrams be permitted to speak for themselves.

The Court: All right. Then, the telegrams may be received as the government's next exhibit. [232]

The Clerk: G.

(The documents referred to were marked Defendant's Exhibit G, and received in evidence.)

[DEFENDANT'S EXHIBIT G]

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Washington

IT:REC:IW: BD: RHS 11:25A.M.
(Unit, Division and Section) (Time written)

Charge:

Treasury Department, Appropriation for
"Collecting the Internal Revenue"

[Written]: 383191

[Stamped]: Received in Mar 17 1944 Chief Counsel's
Office for the Bureau of Internal Revenue March 17,
1944 Civil

TELEGRAM

Official Business—Government Rates
COLLECTOR OF INTERNAL REVENUE
BALTIMORE MARYLAND
FORWARD AIR MAIL SPECIAL DELIVERY AT-
TENTION RECORDS IW BD INCOME RETURNS
FERNAND MERTENS OR GRAVET AND VIC-
TORINE CATHERINE RENOURD MERTENS TEN
FOUR TWO FIVE WILSHIRE BOULEVARD LOS
ANGELES CALENDAR YEARS THIRTY EIGHT
TO FORTY TWO INCLUSIVE IF FORWARDED

(Defendant's Exhibit G)

ADVISE SERIALS AND TRANSMITTAL DATES
URGENTLY NEEDED WIRE REPLY

CARR

DEPUTY [193]

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE

Telegraph Office

[Written]: Rec—IW BD 383191

[Stamped]: Received in Mar 18 1944 Chief Counsel's
Office for the Bureau of Internal Revenue
30W M WR156 30 COLLECT GOVT

BALTIMORE MD MAR 17 1944 533P
COMMISSIONER OF INTERNAL REVENUE
WASHINGTON DC

ATTENTION RECORDS IW:BD RETEL MARCH
17, 1944 RECORDS FAIL TO DISCLOSE RE-
TURNS FILED FERNAND MERTENS OR GRA-
VET AND VICTORINE CATHERINE RENOURD
MERTENS FOR YEARS THIRTY EIGHT TO
FORTY TWO

GEORGE HOFFERBERT COLLECTOR.
600P

[Written]: IT: Rec: IW: BD

[Stamped]: Received Mar 18 1944 Records Division

[Stamped]: Received Spec. Corres. Cont. Mar 18
1944 Bur. Int. Rev. No. 39092

[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Defts. Exhibit G. Date 4/3/44. No. G in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [194]

Mr. Mitchell: Miss Olson, please. Miss Olson, take the stand.

MAY OLSON,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: May Olson. [233]

* * * * *

Direct Examination

By Mr. Mitchell:

Q. Miss Olson, what is your occupation?

A. I am a clerk in the office of the Collector of Internal Revenue.

Q. Are you a qualified deputy collector?

A. Well, I am not a deputy collector, considered a deputy collector right now, since I have become certified under civil service.

Q. How long have you been a clerk in the office of the collector?

A. I have been in the office 19 years and some months.

Q. Have you recently made a search for the purpose of determining whether the records of the local collector's office indicate that any returns at all were filed by either Fernand Mertens or Fernand Gravet or by his wife, Victorine Catherine Renourd Mertens, covering a taxable period subsequent to December 31, 1938? Have you made such a search?

A. Yes; I have.

Q. Of the records? A. Yes.

Q. What records did you examine?

A. I examined all the records up to date, including 1942.

(Testimony of May Olson)

Q. Records of all returns filed? [234]

A. Of the card records of returns filed, yes; and assessments.

Q. Did you find any such record?

A. No; I did not.

Mr. Zeitzius: May I—

The Court: Just a moment.

Mr. Zeitzius: I did not get the question and answer as to what year.

The Court: Every year since 1938.

The Witness: Every year subsequent to 1938, including 1942.

* * * * *

The Court: Let me ask you this: You say you looked at the cards. Do you have a card index system? [235]

A. Yes.

Q. And an individual card for each taxpayer to correspond with the—

A. With the numbers on the returns.

The Court: With the numbers on the returns.

A. And for all assessments.

Q. From that card, if there is one, you can get the number and go to the return. The collector keeps the returns, too? A. Not all of them.

Q. Not all of them?

A. Some of them are in Washington.

Q. Some of them are in Washington?

A. But we do have card records of all returns filed.

The Court: I see; all right.

Q. By Mr. Mitchell: Have you also recently been asked to make a search and did you make a search, such

(Testimony of May Olson)

search, for the purpose of determining whether the records of your office show that either of the plaintiffs in this case, whose names I have just given to you, ever applied for an extension of time for filing returns for the year 1938?

Mr. Zeitzius: Objection. [236]

* * * * *

A. The records were searched. I did not search them myself.

The Court: Objection overruled.

A. Mr. Everson and someone from the income tax department searched them Saturday and found no record for any requests for extension.

Q. By Mr. Mitchell: Was that reported to you?

A. Yes.

Mr. Mitchell: Does counsel want me to bring the other witness down, or will you accept this witness' testimony? I admit that it is hearsay but it can be proven by the other witnesses. I hate to disturb them but I will do it unless counsel—

Mr. Zeitzius: I assume that the witnesses you would bring down would testify with respect to this office, Mr. Mitchell?

Mr. Mitchell: This office, yes; only this office.

Mr. Zeitzius: I see no need for you to bring them.

The Court: All right.

Mr. Mitchell: That is all, Miss Olson, unless counsel has some questions.

Mr. Zeitzius: Just one question.

(Testimony of May Olson)

Cross-Examination

By Mr. Zeitzius:

Q. How far back do you keep your records, Miss Olson?

A. Oh, they are kept, we have records back to, I think, 1920, 1919, card records. [237]

Q. When do you destroy them periodically?

A. They destroy the returns but never the card records.

Q. How recently have the returns been destroyed, that is, what is the latest year?

A. I couldn't say. Back three or four years, though. '37, I think, were destroyed. I am not sure.

Q. Any '38 returns been destroyed?

A. I don't think so. I couldn't say for sure, though. I could find out.

* * * * *

GEORGE W. GIVAN,

called as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: George W. Givan, G-i-v-a-n.

Direct Examination

By Mr. Mitchell:

Q. Mr. Givan, will you please state your occupation?

A. I am an internal revenue agent.

Q. Stationed in the Los Angeles office?

A. That is right. [238]

(Testimony of George W. Givan)

Q. How long have you been stationed in the office here?

A. Oh, about 22 years.

Q. I hand you, Mr. Givan, Plaintiffs' Exhibit 11—I thought I had it here. May I have Exhibit 11, Mr. Clerk, please?

* * * * *

Q. —and will call your attention to a letter that is contained in this group of letters, Plaintiffs' Exhibit 11, dated October 17, 1940, from Acting Internal Revenue Agent in Charge to Mr. Fernand Mertens and Mrs. Victorine Mertens. I call your attention to the last paragraph of that letter, reading: "The returns will be recommended for acceptance as filed and the claims will be recommended for disallowance." Are you familiar with that sentence? A. Yes.

Q. Is it used customarily in particular circumstances in the letters such as this from the revenue agent to the taxpayers in connection with refund claims?

Mr. Zeitzius: Objection unless it is shown that the purpose in which it is used is communicated to the plaintiffs or their representatives. And I think a proper foundation [239] has not been laid, therefore, for the question, and the letter speaks for itself. [240]

* * * * *

Mr. Mitchell: I will withdraw that question and ask that the record show that the original, which has been withdrawn, of Exhibit 11, a letter, the first letter, of November 8, 1940, the following phrase is mimeographed:

"I enclose a copy of the report of the examination of your income tax returns for the year," then the "1938" is typed in and the balance that follows is mimeographed.

(Testimony of George W. Givan)

Mr. Zeitzius: May I interrupt you? That is printed, Mr. Mitchell.

Mr. Mitchell: That is printed.

Mr. Zeitzius: The whole letter is printed except the address, the two years, the date, and the amount and the signature.

Mr. Mitchell: And the signature, very well.

The Court: All right.

Mr. Mitchell: And that same is true of the second letter, dated the same date, addressed to Mrs. Victorine Mertens; and the same is true of the letter of December 9, 1940, all of these letters being a portion of Plaintiffs' Exhibit 11.

That is all, Mr. Givan. [242]

J. R. WHITE,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Mr. Mitchell: Mr. White has been sworn and is now called under Rule 43(b).

The Court: As an adverse witness.

Mr. Mitchell: As an adverse witness; yes, your Honor.
By Mr. Mitchell:

Q. Mr. White, did you ever on behalf of the plaintiffs apply for an extension of time for filing their income tax returns for the full calendar year 1938? [243]

* * * * *

(Testimony of J. R. White)

A. No; we did not.

Q. By Mr. Mitchell: Do you know whether Mr. Levi or Mr. Keesling did?

A. I do not know.

Q. By the Court: At the time you gave them the substitution of attorney, up to that time you had not asked any extension, had you?

A. No. I am sure that they did not file any.

Q. When did you file those substitutions? In 1940, wasn't it? A. In December, 1940.

Mr. Mitchell: In 1940. [244]

The Court: I thought it was 1940.

Q. By Mr. Mitchell: Mr. White, did you ever on behalf of either plaintiff file or cause to be filed federal income tax returns for any period subsequent to the year 1938? A. No. [245]

* * * * *

Q. By Mr. Mitchell: Now, Mr. White, did you ever inform or advise Loew's Incorporated on or about August 30, 1938, that Price-Waterhouse had prepared claims for refund for the additional tax required to be paid because of the determination of the collector's office?

A. Yes. And I find by refreshing my memory here that we originally prepared claims in August and that they were never completed and additional claims were prepared in May of 1939.

Q. These partially prepared returns of August, 1938, why were they not completed? I will withdraw that question. When did you contemplate filing those claims at the time you [246] were partially preparing them?

(Testimony of J. R. White)

Mr. Zeitzius: I object to that, your Honor, as to when he contemplated filing, as immaterial in the light of what instructions he may have received thereafter.

The Court: Overruled. This is cross examination in nature.

Mr. Zeitzius: All right.

The Court: Go ahead.

A. According to the letter we wrote to Loew's, we intended to have Mr. and Mrs. Mertens sign these claims and hold them for filing probably after the end of the year.

Q. By Mr. Mitchell: When, on March 15, 1939?

A. I would suppose that we would wait until after we had information from the Mertens as to the details of their income for the full year 1938, at which time we would—and what we actually did was to determine in the spring of 1939 whether they had additional income to be reported and owned additional tax for 1938, or whether they had a refund.

Q. For the full year, you mean?

A. For the full year; yes, sir, because we always regarded this as something—while you file interim returns when you departed, as Mrs. Mertens did twice, that her tax liability was not determined until the end of the year. And if they had additional income, for instance, if he had come back and acted in another picture or something like that, [247] then they would have had to file an additional return.

Q. For the full year?

A. For the full year 1938; yes, sir.

(Testimony of J. R. White)

Q. And then, that was the reason you did not get them immediately to verify the returns before they left?

A. That is right. We realized that if we had them verify the claims before they left that we would have to prepare new ones at the end of the year.

Q. Have you those claims with you, the partially prepared claims?

A. I do not have the partially prepared claims and I can't find them in my file.

Q. What period did those claims cover, the period up to September 14, 1938?

A. No; they would have covered the entire year.

Q. You say, "they would have"?

A. If they had been completed, they would have covered the entire year; yes, sir.

Q. Have you before you, Mr. White, the *subpoena duces tecum* that was served upon you in this case?

A. Yes, sir.

Q. I call your attention to Item 14—Item 4, rather, in it and will ask you to refresh your memory concerning the documents referred to. A. Yes, sir.

Q. Are you able to produce any other letters or [248] written instruments described in Item 4 other than those that have been offered or introduced into evidence?

A. As I understand Item 4, this calls for all letters or written instruments addressed to me or to Price-Waterhouse by either Mr. or Mrs. Mertens.

Q. That is right; relating to—

A. The services rendered or to be rendered by him in the production of the photoplay and—

(Testimony of J. R. White)

Q. Relating to monies.

A. —monies received by either of plaintiffs from Loew's Incorporated. I would say that the only communication that I am aware of that we have ever received from Mr. Mertens is the communication of January 11, 1939.

Q. Which has been introduced into evidence as plaintiffs' exhibit—what is the number of that exhibit, please?

Mr. Zeitzius: Part of Exhibit 12, in answer to his letter of the 28th of December.

Mr. Mitchell: Oh, yes; it is Exhibit 12, letter of January 11. That is right.

Q. Calling your attention now to Item No. 5 in this subpoena: All original letters received by you or Price-Waterhouse from Loew's Incorporated subsequent to January, 1938, relating to the same subject. Have all of those letters been introduced into evidence, or have you others?

A. I have at least one other here. This refers to [249] services, compensation received or to be received by the plaintiffs.

Q. Wait a moment. Is this the enclosure?

A. No. Mr. Obinger was the Warner Bros. Picture man, and this is the letter which confirmed the withholding, or told us the amount of withholding by Warner Bros. of \$1,002. I don't recall that figure.

Q. Are there any others?

A. This is a letter from Loew's to us enclosing a letter from Noel Singer to Benjamin Thau enclosing a letter of January 11th from Fernand Gravet to Price-Waterhouse.

(Testimony of J. R. White)

Q. Has that letter been introduced into evidence, the one of January 11, 1939? A. That has.

Q. Where is the letter dated March 16, 1939?

A. I have the copy of such letter but I do not have the original.

Mr. Mitchell: Am I right?

Mr. Zeitzius: I don't know. I want to ask, Does counsel have something special in mind? This looks like a fishing expedition.

Mr. Mitchell: Frankly, this is a fishing. [250]

* * * * *

(Counsel and the witness conferring together while examining witness' file.) [252]

* * * * *

Mr. Mitchell: Mr. White, will you please produce an original letter from Loew's Incorporated to Price-Waterhouse of April 26, 1939, relating to the completed California income tax returns of the plaintiffs for the year 1938?

Let the record show that the witness has just handed me an original letter on the stationery of "Metro-Goldwyn-Mayer Pictures," dated April 26, 1939, addressed to Price-Waterhouse and Company—Re: FERNAND MERTENS (GRAVET) TAX MATTERS" and signed "LOEW'S INCORPORATED." We offer this letter into evidence as defendant's next exhibit. [260]

* * * * *

The Court: I will see that he does not get in anything that is too—that he does not misuse his inquisitorial powers. That is an awfully good phrase.

Mr. Mitchell: Exhibit H.

(The document referred to was marked Defendant's Exhibit H, and received in evidence.)

[DEFENDANT'S EXHIBIT H]

[Crest]

METRO-GOLDWYN-MAYER PICTURES

Culver City

California

April 26, 1939

[Stamped]: Attended to by JRW on 4/27/39 Answered by JRW on 4/27/39 Apr 27 1939 Passed by Partner W

[Written]: JRW

Price, Waterhouse and Company

530 West Sixth Street

Los Angeles, California

Attention: Mr. White

Re: FERNAND MERTENS (GRAVET)

TAX MATTERS

Gentlemen:

We reply to your letter of April 11, 1939 enclosing two copies of the tentative 1938 California income tax returns of Mr. and Mrs. Fernand Mertens.

The originals of the returns are returned herewith to be filed by you with the Franchise Tax Commissioner, Income Tax Division, Sacramento, California, as you hold Power of Attorney from Mr. and Mrs. Mertens and are therefore qualified to complete the affidavit on the returns.

(Defendant's Exhibit H)

Our check for \$978.49 in payment of one-third of the total tax of \$2,935.47 due on Fernand Mertens' return and check for \$1,007.85 in payment of one-third of the total tax of \$3,023.55 due on Mrs. Mertens' return are also enclosed.

We note that you have requested extension of time for filing these returns because Mr. and Mrs. Mertens are outside of the United States and completed returns are being sent to them for signature.

Yours very truly

LOEW'S INCORPORATED

By W. K. Craig

No Agreement or Order Will Be Binding on This
Corporation Unless in Writing and Signed by
an Officer

WKG

JJM:G

[Endorsed]: Case No. 3002. Mertens vs. Rogan et al.
Defts. Exhibit H. Date 4/3/44. No. H in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J.
Somers, Deputy Clerk. [195]

* * * * *

Q. By Mr. Mitchell: Mr. White, will you please produce your office copy of a letter from Price-Waterhouse to the plaintiffs, dated March 4, 1940? You are taking this off? A. That is not it.

(Testimony of J. R. White)

Q. You are taking this office copy of a letter from [262] the files of Price-Waterhouse and Co., Mr. White?

A. That is right; yes.

Mr. Mitchell: Defendant offers this as Defendant's next exhibit in order.

The Court: Have you seen it, Mr. Zeitzius?

Mr. Zeitzius: Yes. It merely transmits a claim of refund or, rather, advises the plaintiffs that it has been filed.

Mr. Mitchell: It indicates, your Honor, the fact that the plaintiffs' agent, attorney in fact, treated the refund claim as a refund claim and called it a refund claim. That is the only purpose of that.

The Court: All right.

The Clerk: Defendant's Exhibit I.

The Court: It may be received.

(The document referred to was marked Defendant's Exhibit I, and received in evidence.)

[DEFENDANT'S EXHIBIT I]

COPY - LOS ANGELES

March 4 1940

JRW:PC

Mr. Fernand Mertens,
Rue de Buzenvol,
St. Cloud (S. & O.),
France.

Dear Sir:

We have filed with the Collector of Internal Revenue at Los Angeles the claims for refund of 1938 Federal

(Defendant's Exhibit I)

income tax which you and Mrs. Mertens executed and forwarded to us in June 1939.

Yours very truly,
JRW

Copies to
New York ✓
San Francisco ✓

[Endorsed]: Case No. 3002 Y. Civ. Mertens vs. Rogan, Defts. Exhibit I. Date 4/3/44. No. I in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [196]

* * * * *

Mr. Mitchell: Yes, your Honor. We offer into evidence as defendant's next exhibit a certified copy of a letter from Price-Waterhouse to the collector of internal revenue, Los Angeles, dated September 7, 1938, re Fernand Mertens and Victorine *Caterine* Renourd Mertens, and to which is attached data for determining income tax liability [263] of Mr. and Mrs. Mertens to date of departure of Mr. Mertens, September 14, 1938, being quite similar, as I was about to say, to the letter and data schedule attached to the refund claim of Fernand Mertens which was filed on that date.

Mr. Zeitzius: My only objection, your Honor, is that it is the same. It is already in evidence. It is the same letter and the same schedule that is already attached to Plaintiffs' Exhibit 5. It is identical to the letter.

* * * * *

Mr. Mitchell: That is offered chiefly, your Honor, because it is a much larger and clearer copy and can be more easily read without a magnifying glass.

* * * * *

(Testimony of J. R. White)

The Court: Why don't you attach it, it being identical, and make it a part of the exhibit 5?

* * * * *

Mr. Zeitzius: This is 5. [264]

* * * * *

Mr. Zeitzius: They are both identical, your Honor. Page 3, your Honor, if you will look at page 3 of 5, schedule 5, you will find it starts the letter of September 7th, page 3. That is the same letter as in larger form here. The government photostated both of them.

The Court: Where is the misspelling?

Mr. Zeitzius: If you turn to the next page, it says "date" here instead of "data" I believe, if I am correct. Yes; it is "d-a-t-e" instead of "d-a-t-a."

The Witness: My copy was correct.

The Court: This may be attached as part of Exhibit 5.

Q. By Mr. Mitchell: Mr. White, I hand you Plaintiff's Exhibit 5 and call your attention to a page that here seems to be in the lower right-hand corner called "A-2" or "A-21," I don't know which.

(Counsel conferring privately.)

I call your attention to the item and the data for determining tax schedule, the item of gross income, reading: "1938 Federal income tax claimed by Collector of Internal Revenue to be 'constructively received' from Loew's Incorporated 40,017.41." I think you testified Friday regarding the method you used for determining that figure? [265] A. Yes, sir.

Q. Within one penny, I believe you said?

A. This is determined exactly.

(Testimony of J. R. White)

Q. That is an exact determination?

A. By an algebraic formula; yes.

Q. So that that amount, upon the collector's theory, is accurately determined—was accurately determined and that is the correct figure under the collector's theory and demand made at that time?

A. That is correct; yes.

Q. And the total tax computed on the last page, \$37,000—no. Well, the normal tax and the surtax for each of the parties was also accurately determined by you? A. That is right.

Q. And reported here also on the theory of the collector and the demand that the collector made at that time?

A. Yes. The \$20,669.80 for each spouse was the computation of the tax, and I believe that that was checked and is shown as the same amount and the computation on the forms that were filed. And, as to those computations, they were, of course, made in the collector's office, so we have the total check there; and the other figure, the only way we had of checking that was the self-proving of it. The pencilled figures on the bottom of that in my handwriting reconcile the amount of \$41,339.60 with the amount of \$40,017.41.

Q. Oh, yes. That total tax, then, is based upon the [266] total amount of the taxes that were paid for Mr. and Mrs. Mertens by Loew's Incorporated pursuant to the basis demanded by the collector, is that correct?

A. Yes.

The Court: They said so. They did not concede it. They say according to the claim of the collector.

(Testimony of J. R. White)

The Witness: That is right. In order for Mr. Mertens to get his sailing permit they had to pay \$37,073.27, the last figure you see there.

Q. By Mr. Mitchell: That was the balance unpaid?

A. That was the balance due. Now, you add to that the amount of \$3,245.92.

Q. Yes.

A. Which was paid at the time Mrs. Mertens got her sailing permit.

Q. By Loew's Incorporated?

A. By Loew's Incorporated, and that gives you a total of \$40,300 and some odd dollars.

Q. Which is the figure which appears in the gross income?

A. No, no. Then, included in that was approximately \$300 of taxes on the French income. The figure is on the bottom of the exhibit there. I do not have it in front of me.

The Court: Here it is right here. It is hardly visible. [267]

The Witness: The figure of 301 and, I believe it is 78 cents.

Mr. Mitchell: I see.

The Witness: That was the tax on the French income.

Q. By Mr. Mitchell: That was not included?

A. So that, in any event, that would be chargeable as a loan, no matter what happens, who was right in this case, and Mertens would have to pay the \$301. They would owe that out of their own pockets eventually, so that was taken off and that comes down in the answer of \$40,017.41.

Mr. Mitchell: I see. That clarifies that. I think that is all.

(Testimony of J. R. White)

Cross-Examination

By Mr. Zeitzius:

Q. Mr. White, if we eliminate from consideration the amount withheld by Warner Bros. of \$1,020.41, the amount of \$301.78 tax with respect to the French income shown in this schedule that we were just discussing, attached to Plaintiffs' Exhibit 5, what resultant tax would you have? Would you have the same tax as you have denominated \$40,017.41 up above in the income? Would they both be the same?

A. You get the same—no. You would have a tax of \$40,017.41 plus \$1,020.41, or \$41,037.82.

Q. I see. In other words, if we eliminate the French income alone, the tax on the French income, we would have [268] \$40,017.41 up above in the income part of the schedule as well as the tax result, is that it? That was the idea of—

A. No. You still would include the \$40,017.41 as gross income under this theory.

Q. Yes. And then the tax would be exactly the same if we eliminate the French income, is that true?

A. That is right.

Q. So that what—

Mr. Mitchell: You mean the gross income tax?

Mr. Zeitzius: Yes; the gross.

A. No. If you eliminate the French income from the return, then the tax will be \$301.78 less than this \$41,339.60 figure, or the tax will be \$41,037.82.

Q. Then if we eliminate the amount withheld by Warner Bros., which was already taken out to be paid, we would have the same amount down below as the tax lia-

(Testimony of J. R. White)

bility, as the amount which the collector requires you to include up above as income, isn't that correct?

A. No; that would not follow, because, if you eliminate the \$1,020.41 from income, that would only reduce the tax by about \$600. In other words, this \$1,020.41 was paid by Warner Bros. in 1938 in respect of the income that Gravet had earned from Warner Bros.

Q. I am afraid I probably did not make my point clear. My point was this: That the collector was demanding an amount of tax which the collector contends was due by Loew's [269] under the contract equal to the amount that was required to be included up above in income, namely, \$40,017.41, isn't that right?

A. That is right.

Q. When Mr. Mitchell asked you before about the amount paid by Loew's, what did you mean when you used the words "paid by Loew's" and you answered his question with respect to the June payment?

The Court: Why, it is evident all these amounts were paid by Loew's.

Mr. Zeitzius: All right. I withdraw the question.

Redirect Examination

By Mr. Mitchell:

Q. Mr. White—I almost overlooked it—has brought the original computation, a copy of his original notes and the original computation which was submitted to the collector about August 25th. Is that correct, Mr. White?

A. That is correct; yes, sir.

Q. And this is copied from your working papers?

A. This is a copy of the schedule that I took to the collector's office.

(Testimony of J. R. White)

Q. And which he rejected?

A. Yes. As a matter of fact, I left with the collector's office for a couple of days, and then they returned it back to me and told me what changes they wanted.
[270]

Mr. Mitchell: All right. We offer that in connection with the other computations which were introduced by the plaintiffs.

The Court: All right; it may be received.

The Clerk: Defendant's J.

(The document referred to was marked defendant's exhibit J, and received in evidence.)

[DEFENDANT'S EXHIBIT J]

Copy of Data Presented to Collector's Office
About August 25 1938

FERNAND MERTENS

(known professionally as Fernand Gravet)

VICTORINE CATHERINE RENOURD MERTENS

Data for Determining Income Tax Liability of Mr. and
Mrs. Mertens to Date of Departure of Mr. Mertens
September 14 1938

Income from profession:

Loew's Incorporated—

Salary	\$120,000.00
--------	--------------

1938 Federal old age bene- fits tax	30.00
--	-------

\$120,030.00

(Defendant's Exhibit J)

Warner Bros. Pictures, Inc.—

Salary	\$ 4,375.00	
1937 Federal income tax	4,592.06	
1938 Federal income tax	1,020.41	
1938 California income tax	88.08	
1938 California unemployment insurance tax	98.54	
1938 Federal old age benefits tax	30.00	
		<hr/>
		10,204.09
		<hr/>
		\$130,234.09

Less—Business expenses:

Commission paid agent	\$ 12,437.50
Wardrobe 50% of \$298.90	149.45
Books and records for research	18.28
Studio valet (salary \$479— expenses mostly meals \$102.40)	581.40
Gratuities to studio employees	119.28
Wigs, make-up supplies, etc.	69.32
Publicity	337.55
Telephone calls to France on business	1,170.50
Dental and skin treatments, including \$250 for special set of teeth for picture “The Great Waltz”	1,025.15
Dues—Screen Actors Guild	75.00

(Defendant's Exhibit J)

Automobile expenses:

Chauffeur's salary and meals	\$ 915.90
---------------------------------	-----------

Gas and oil \$188.66, Parking, etc. \$23.30	211.96
--	--------

Insurance—total for year commencing April 1938 \$102.71, one-half thereof	51.35
--	-------

Depreciation of Pack-
ard sedan at 25%
per anum—

Cost April 1938	\$1,800
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=====

Depreciation for six months at 25%	225.00
---------------------------------------	--------

\$1,404.21

=====

Less—One-half thereof al- located to personal use	702.10
--	--------

16,685.53

\$113,548.56

Contribution:

Mount Sinai Hospital	\$ 10.00
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Taxes:

Federal telephone	5.30
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(Defendant's Exhibit J)

California income	88.08
California unemployment insurance	98.54

201.92

Net income from sources within United States \$113,346.64

Income from other sources:

Rentals from flats in Paris—

Rentals for 1938	34,000 francs
Expenses for year	3,400 francs

Net for year 30,600 francs

Converted at \$.0273 (rate
published in Wall Street
Journal for August 18
1938) equals \$ 835.38

For eight and one-half months ending
September 15 1938 591.73

Net income \$113,938.37

[197]

	Mr. Mertens	Mrs. Mertens	Total
Net income, as above	\$56,954.19	\$56,954.18	\$113,908.37
Credit for personal exemption 8/12 of \$2,500	(833.34)	(833.33)	(1,666.67)

(Defendant's Exhibit J)

Credit for depend- ents 8/12 of \$800 (Mother age 73 and mother-in-law age 76)	(266.66)	(266.67)	(533.33)
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Amount subject to surtax	\$55,854.19	\$55,854.18	\$111,708.37
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Earned income credit	1,400.00	1,400.00	2,800.00
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Amount subject to normal tax	\$54,454.19	\$54,454.18	\$108,908.37
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Surtax	\$ 9,514.80	\$ 9,514.80	\$ 19,029.60
--------	-------------	-------------	--------------

Normal tax	2,178.17	2,178.17	4,356.34
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	\$11,692.97	\$11,692.97	\$ 23,385.94
--	-------------	-------------	--------------

Less:

Amount previously paid		(3,245.92)	(3,245.92)
---------------------------	--	------------	------------

Amount withheld at source by Warner Bros. Pictures, Inc.	(1,020.41)		(1,020.41)
---	------------	--	------------

Balance payable	\$10,672.56	\$ 8,447.05	\$ 19,119.61
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[Endorsed]: Case No. 3002. Mertens vs. Rogan.
Defts. Exhibit J. Date 4/3/44. No. J in Evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis
J. Somers, Deputy Clerk. [198]

* * * * *

Mr. Mitchell: The defendant offers into evidence alien income tax return of Fernand Gravet and wife for the period beginning January 1, 1937, and ending January 31, 1937, which presumably is a joint return of both parties. That is a certified copy, certified by the Commissioner.

Mr. Zeitzius: I want to say this: That this return does not appear to me to be complete. They all require information on the backs, and unless counsel is prepared to show that there was not a back to this or another part or schedules, I would object to this as being incomplete, despite the certificate on here.

I want to say this: That I did see another return with [271] a certificate that I am personally satisfied is incomplete, and that is on that March return, Mr. Mitchell.

Aside from that, I would like to know the purpose for which it is offered. I see no relevancy or materiality. It is for another year preceding the taxable year, and can have no possible bearing thereon, especially if it is designed to establish their status as residents or non-residents. I would submit that a prior return could not establish that. * * * [272]

* * * * *

The Court: So I will overrule the objection and receive it in evidence.

Mr. Zeitzius: May I have Mr. Mitchell's assurance that the original did not have a second page?

Mr. Mitchell: I am sorry, I just don't know. All I know is what the Commissioner sent me.

The Court: Of course, there must be a second page.

Mr. Mitchell: There usually is.

The Court: You know, they have to give you the basis. Your first page is merely a summary of your second.

Mr. Zeitzius: That is right.

Mr. Mitchell: Is the page numbered there?

Mr. Zeitzius: There might be a question there on the second page.

The Court: There might not be anything on it. I don't know. It is all an incomplete return. [274]

* * * * *

The Clerk: This will be K.

(The document referred to was marked defendant's exhibit K, and received in evidence.)

Mr. Mitchell: We now offer nonresident alien income tax return of Victorine Mertens, only for the period beginning January 1, 1937, and ending November 30, 1937,

* * * * *

Mr. Zeitzius: I would say the same objection, and no doubt the Court will make the same ruling.

The Court: I will overrule it. It may have a bearing on it. Of course, there is evidence in the record showing that they had been here before.

Mr. Mitchell: That is right, your Honor.

The Court: On a visitor's permit, which is good only for six months.

Mr. Mitchell: That is right. [275]

The Court: It may be renewed for six months more.

Mr. Mitchell: That is right.

The Court: And thereafter they went back and came back as a quota number, so there would be no inconsistency owing to the fact of this return to secure a clearance

condition, they call it—"bailing out," as I call it. They bailed themselves out in 1937 for the purpose of doing it. In the past, you know, you could go to Mexico, the government allowed it to be done, and to Canada.

I will receive it in evidence.

(The document referred to was marked Defendant's Exhibit L, and received in evidence.)

Mr. Mitchell: In this Exhibit L which has just been introduced attention is called to the fact that up until November 30, 1937, or in fact, the date of sailing, December 26, 1937, Mrs. Mertens swore that she had no income whatsoever.

The Court: It may be received.

Mr. Mitchell: We now offer a certified copy of a non-resident alien income tax return for 1937, filed by Fernand Gravet, also known as Fernand Gravey, care of Sam Jaffe.

The Court: You forgot one important phrase here. It says "No Income. Visiting." (Defendant's Exhibit L.)

Mr. Mitchell: That is right, your Honor. Even though visiting, she would have to pay income on—[276]

The Court: No, no; that she had no income. She had no income because she was a visitor.

Mr. Mitchell: That is right.

* * * * *

Mr. Mitchell: For the whole year 1937, the certified copy of the return of the husband, the plaintiff in this case, not a departing alien return but a nonresident alien income tax return filed January 4, 1938.

* * * * *

The Court: I call your attention to this fact: that evidently they arrived separately, because Mrs. Gravet has stated that she arrived on September 30, 1937. That is in the 1937 income tax return.

Mr. Mitchell: That is the second return.

The Court: What?

Mr. Mitchell: She was here in January and then returned.

The Court: Date of arrival in the United States, September 30, 1937.

Mr. Zeitzius: That is right.

The Court: In the joint return.

Mr. Mitchell: For January. [277]

The Court: For January, which is signed by the husband, not by her, although he makes it for both—

Mr. Mitchell: That is right.

The Court: —he gave his date of arrival as October 27, 1936.

Mr. Mitchell: And date of departure?

The Court: Date of departure, January 16, 1937.

Mr. Mitchell: Yes, January 16, 1937. The sole purpose of this offer of the returns for 1937 is to establish a sworn statement that all of the earnings of Mr. Gravet in 1937 were owned exclusively by him and taxable only to him by both spouses.

Mr. Zeitzius: In that respect, I object to the introduction of the '37 return, and I call the Court's attention to the fact that it was sworn to before James F. McDonald, deputy collector, and, by comparison, you will see that it is the same James F. McDonald whose signature appears on the returns that are in evidence in this

case as the departing alien returns. And I do not feel that in determining whether or not the 1938 income is community it is competent to show what was done in 1937 under different conditions. [278]

* * * * *

The Court: * * * All right; objection overruled. That may be received.

The Clerk: M.

The Court: That will be M.

(The document referred to was marked Defendant's Exhibit M, and received in evidence.)

Mr. Mitchell: We also offer in evidence the income tax return of the plaintiff husband, nonresident alien income tax return for 1936, also verified by him, indicating that all the income reported was salaries and wages received from Warner Bros. Pictures, and one hundred per cent of which was reported solely by the husband.

Mr. Zeitzius: The same objection.

Mr. Mitchell: Individual separate return.

The Court: All right. It may be received.

The Clerk: Defendant's N.

(The document referred to was marked Defendant's Exhibit N, and received in evidence.)

Mr. Mitchell: Also, a certified copy of the claim for refund for \$213.29, income tax for 1936, filed not by both the spouses but by the husband alone. [279]

* * * * *

Mr. Zeitzius: The same objection as to the returns.

The Court: Overruled. It may be received.

The Clerk: O.

(The document referred to was marked Defendant's Exhibit O, and received in evidence.)

Mr. Mitchell: Also, the Commissioner's certified copy of the Bureau's certificate of over-assessment allowing the claim for refund as has just been introduced as Defendant's Exhibit O.

Mr. Zeitzius: The same objection, your Honor, as incompetent, irrelevant, and immaterial.

The Court: Overruled.

The Clerk: Defendant's Exhibit P.

(The document referred to was marked Defendant's Exhibit P, and received in evidence.) [280]

* * * * *

LEON LEVI,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mitchell:

Q. Mr. Levi, you were with Loeb & Loeb until what date was it?

A. Until last December 31, 1943.

Q. Will you state what arrangement Loeb & Loeb had with Mr. Gravet, the plaintiff, for the payment of his fees in prosecuting this suit?

Mr. Zeitzius: May I have the question? Oh, I am sorry.

(Testimony of Leon Levi)

Q. By Mr. Mitchell: Did Loeb & Loeb have any arrangement with Gravet for the payment of its compensation for prosecuting this suit?

A. That question was never discussed with anyone, to the best of my knowledge.

Q. Never discussed with the plaintiff?

A. No.

Mr. Mitchell: That is all.

Mr. Zeitzius: I want to say this: I move to strike out the question and answer, your Honor, because I think there is a presumption that counsel appearing in a case—

The Court: In view of the negative answer you do not need that. There is a presumption that counsel have [281] authority.

Mr. Zeitzius: All right.

Mr. Mitchell: My question only was directed toward the question of the compensation.

The Court: Yes. There is also an affidavit which they attach to their power of attorney, Mr. Levi's power of attorney, which states that they had no arrangement for any contingent fees.

Mr. Zeitzius: That is right.

The Court: So any opprobrium applied to them is gone. All right, Mr. Mitchell.

* * * * *

GEORGE A. WARREN,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

* * * * *

Mr. Mitchell: Mr. Warren is called also under Rule 43(b) as an adverse witness.

Mr. Zeitzius: At this point I want to let the record [282] show that Mr. Warren is not callable under Rule 43(b) or whatever it is, as a witness. Mr. Warren is not an agent.

The Court: He is merely an accountant for a firm. You can't call an employee. It has to be an executive officer. [283]

* * * * *

The Court: Oh, no. It must be the party. He is not Loew's Incorporated, he is not an officer. Are you an officer of Loew's?

The Witness: No, sir.

The Court: Do you own any stock in it?

The Witness: No, sir.

The Court: Do you get anything except your salary?

The Witness: Just my salary.

The Court: An occasional bonus?

The Witness: I would like even to get that, too.

The Court: Not even a bonus?

The Witness: Nothing but my salary.

The Court: All right. Go ahead, now.

(Testimony of George A. Warren)

Direct Examination

By Mr. Mitchell:

Q. Calling your attention to Defendant's Exhibit A—have you that, Mr. Clerk?—a letter dated September 8, 1938, from Loew's Incorporated to Mr. Gravet relating to the arrangement concerning the monies that were paid the day before to the Collector of Internal Revenue, I will ask you whether Loew's Incorporated have the plaintiff's reply to that letter? A. Yes; we do.

Q. Will you produce it, please?

A. (Witness producing paper.)

The Court: He even has the envelope. [288]

Q. By Mr. Mitchell: Have you the original and the envelope in which it was contained?

A. I believe this is it.

Mr. Mitchell: The witness hands me an envelope postmarked "United States" somewhere, "Special Delivery." On the envelope, "Fernand Gravet, Westwood Ambassador, Westwood, Los Angeles, California," the return address, special delivery and registered.

Q. Do you have a photostat of that for the Court to look at?

A. (Witness producing paper.)

Mr. Mitchell: I have never seen this before, your Honor. [289]

* * * * *

Mr. Mitchell: This photostat will be all right.

(Testimony of George A. Warren)

The Court: That looks a good photostat.

Mr. Mitchell: We offer that as defendant's next exhibit.

The Court: Better than the Government's, I will say that much.

Mr. Mitchell: Yes; it is. It is larger.

The Court: It is larger, and evidently they are more used to taking them.

The Clerk: Defendant's Q.

The Court: You mark it, Mr. Somers, then I will look at it.

Mr. Mitchell: So it may be identified for the record, this is the letter dated September 13, 1938, an original letter to Mr. E. J. Mannix, Vice President, Loew's Incorporated, Culver City, California, filed "Received," or stamped [290] "Received September 14, 1938," and signed "Fernand Gravet."

Mr. Zeitzius: He has the name "Levi" up at the top above the stamp.

Mr. Mitchell: And the word "Levi" in longhand is in the upper right-hand corner. And there is another stamp.

The Court: "F. L. H. Sep. 14, 1938," something that looks like "J. H. I."—it is very incomplete—"Sep. 15. 1938."

Mr. Mitchell: Yes, your Honor.

(The document referred to was marked as Defendant's Exhibit Q. and was received in evidence.)

[DEFENDANT'S EXHIBIT Q]

September 13, 1938

Mr. E. J. Mannix, Vice President
Loew's Incorporated
Culver City, California

Dear Mr. Mannix:

I am in receipt of your letter of September 8, 1938, pertaining to the subject of taxes. The salient features of the income tax conditions of my contract as they have developed to date appear to me, somewhat not in accord with your letter, to be as follows:

The tax payment of \$40,319.19 made by you represents additional compensation paid to me for my services in connection with the motion picture production, "The Great Waltz". This money is not a loan and I will not be required to repay any refunds therefrom unless such refunds are actually received by me, nor will I be required to pay any additional taxes that may arise in connection with the related taxable income, but you will pay such additional taxes when determined to be payable.

You will appreciate the fact that I have not been concerned with the method in which you have handled the adjustments as to the allocation of tax burden between your firm and Warner Bros., and, since you have had the entire control of the situation, you will accept the adjustment already determined without the right to come to me at a future date and re-compute Warner Bros.' portion of the liability and ask me to stand the onus of

(Defendant's Exhibit Q)

negotiating with them at a time when my position will be such that I can not obtain a proper settlement. Moreover, I might mention that I have consistently justified this position because we have always regarded my operations as being under the original contract with Mervyn LeRoy, and any adjustments between the various studios would have to be worked out not by me but by the studios

It has always been our understanding that you would arrange the payment of compensation and taxes so that in the year 1938 there would be a taxable receipt of all monies that relate to my work in "The Great Waltz" and that, by the element of constructive receipt or by the filing of tax returns prior to the end of the calendar year 1938 and the payment of taxes thereon within the calendar year, we would establish the condition that all taxes paid on the basic income would be taxable in the year 1938 in such manner that there would be no carry-over into the year 1939. [215]

Mr. Mannix

Page 2

In connection with the contents of your letter of September 8, 1938, I trust that there is no purpose intended on your part to attempt to have the \$40,000.00 treated as a tax payable in the year 1939 and therefore not taxable as a constructive receipt in the year 1938, unless you reiterate in writing your intentions to defray the tax burden on that \$40,000.00 in such manner that my tax burden otherwise would not be increased in the

(Defendant's Exhibit Q)

year 1939 and thereafter. I understand that the Bureau of Internal Revenue has construed the payment of the \$40,000.00 tax to be taxable in the year 1938, and for all practicable purposes I feel that this should remain undisturbed unless I am indemnified properly against the invocation of any ideas that you have to the contrary.

I have been informed that in the year 1939 I will be required to file an income tax return with the State of California for the calendar year 1938 on which, for purposes of discussion, a tax will be payable roughly in the amount of \$10,000.00, based upon the amount of income reported to the Federal Government to date of my application for sailing permit. You are required by my contract to pay these taxes and defray them under the same arrangements for allocation of burden made with Warner Bros. as you recently did in the case of the Federal taxes. I also understand that the payment of these state taxes in 1939 will be construed as a taxable receipt in the year 1939 for Federal tax purposes, but, inasmuch as this taxable receipt will be offset by a deduction for the state income taxes paid, there will be no problem of a carry-over of taxable income in the year 1939 for Federal income tax purposes. However, since the payments of state income taxes are not deductible for state income tax purposes, there will be no offset to the additional taxable income in the State tax liability for the year 1939 on account of the payment of these state taxes. Therefore, you will be required to sustain the related state income taxes payable.

It is my desire to cooperate with you and minimize your tax cost, as I have consistently indicated. At the same time, I trust that you will bear in mind that I

(Defendant's Exhibit Q)

have been led to believe that anything that I agree to in these matters will not in any way create a tax burden upon me on other income beyond that which I would otherwise have to sustain. I believe it therefore advisable to state that anything to the contrary that may develop by technicality or by misstatement of understanding would be construed and corrected in the light of this fundamental concept as originally established in my agreement with Mervyn LeRoy.

Very truly yours,

Fernand Gravet
(Fernand Gravet)

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Defts. Exhibit Q. Date 4/3/44. No. Q in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [216]

Q. By Mr. Mitchell: Mr. Warren, have you your subpoena with you? A. Yes; I have.

* * * * *

Item 3. Have you any other original letters or other written instruments addressed to Loew's Incorporated or its agents or representatives by Fernand Mertens, or by his agents and representatives other than those that have already been offered or introduced into evidence?

A. I don't thing so, but I am trusting pretty much to memory as to what has been offered into evidence.

Q. Original letters from Mr. Gravet, or you might go [291] through your file there.

A. I will go through it and see what I can find.

(Testimony of George A. Warren)

The Court: I will return the original to you. I have read it.

The Witness: I believe that this has been offered. I am not sure (indicating file).

Mr. Mitchell: Is this in evidence, Mr. Zeitzius?

Mr. Zeitzius: No. I did not offer it because there was a ruling on the letter of the 30th of August. But maybe, if you want it in, I may not have any objection to it.

Mr. Mitchell: I have to look at it. Haven't we introduced the office copy of this?

Mr. Zeitzius: I think not. I marked on my copy "Not offered," because I took it up and considered it after the letter of August 30 was not received.

The Court: Are you finding anything?

Mr. Mitchell: There was one letter that we saw the office copy of.

The Witness: Consent to the assignment of the LeRoy contract (indicating).

Mr. Mitchell: I think we should complete this. Mr. Warren hands me an original letter addressed to Loew's Incorporated, dated Culver City, California, July 29th, 1938, signed by Mervyn LeRoy, purporting to be an assignment of LeRoy's contract to Loew's, then endorsed "Accepted: LOEW'S INCORPORATED by Benjamin Thau, Assistant Secretary," [292] and endorsed at the bottom is a consent to the assignment signed by "Fernand Gravet," subject to certain limitations there stated, and dated July 27th, 1938—it may be the 29th—consented to by Gravet probably July 29, 1938. We offer a photostatic copy of that letter in lieu of the original as Defendant's next exhibit.

The Clerk: Which will be R.

(The document referred to was marked Defendant's Exhibit R, for identification.)

[DEFENDANT'S EXHIBIT R]

7-29-38 C-W

Culver City, California

July 29th, 1938

Loew's Incorporated,
Culver City,
California.

Gentlemen:

This will confirm the following:

I hereby sell, assign, transfer and set over unto you all of my right, title and interest in and to the contract of employment between myself and Fernand Gravet dated May 6, 1936, as the same may have heretofore been amended and/or extended.

You hereby accept the above assignment; with the understanding, however, that you are assuming hereunder only such liability under said contract of May 6, 1936, as has arisen since April 15, 1938 and in connection with the photoplay now entitled "The Great Waltz".

If the foregoing meets with your approval please so indicate by your acceptance hereof in the space hereinbelow provided.

Yours very truly,

Mervyn LeRoy
(Mervyn LeRoy)

Accepted:

LOEW'S INCORPORATED

By Benjamin Thau

Assistant Secretary

(Defendant's Exhibit R)

I hereby consent to the above assignment and to the assumption of liability thereunder by Loew's Incorporated, limited as above specified, and in consideration of the acceptance of said assignment by Loew's Incorporated I hereby release and discharge Mervyn LeRoy of and from all liability whatsoever which he ever had or now has or hereafter may have to me arising out of or under or in any way connected with my contract of employment with him dated May 6, 1936, as the same may have heretofore been amended and/or extended, or arising out of any matter or thing relating thereto or arising out of any other matter or thing whatsoever; provided, however, that nothing herein contained shall be construed to release Mervyn LeRoy from his obligations with respect to the payment of taxes under the provisions of paragraphs 8 and 18 of said contract of May 6, 1936, as heretofore amended and/or extended.

Dated: July 29th, 1938.

Fernand Gravet
(Fernand Gravet)

[Endorsed]: Case No. 3002. Mertens vs. Rogan. Defts. Exhibit R. Date 4/3/44. No. R in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [217]

The Court: That is the assignment of "E," is that correct?

Mr. Mitchell: The assignment of the LeRoy contract, if that is "E."

(Testimony of George A. Warren)

The Court: "E" is the Mervyn LeRoy contract.

Mr. Mitchell: That is right.

The Court: All right.

Q. By Mr. Mitchell: Do you find any others signed by Gravet?

A. Nothing signed by Gravet.

Q. Anything signed by Price-Waterhouse as agent?

A. Here is a Price-Waterhouse letter.

Mr. Mitchell: I am handed by the witness an original letter from Price-Waterhouse & Co., dated Los Angeles, July 27, 1938, addressed to Loew's Incorporated, attention Mr. Floyd Hendrickson, and the subject "FERNAND GRAVET," relating to taxes, 1938—39 taxes of Gravet, with a computation [293] attached thereto which accompanied the letter. I will offer into evidence the photostatic copy in lieu of the original. [294]

* * * * *

The Clerk: S.

(The document referred to was marked Defendant's Exhibit S, and was received in evidence.)

[DEFENDANT'S EXHIBIT S]

PRICE, WATERHOUSE & CO.

530 West Sixth Street

LOS ANGELES

July 27 1938

Loew's Incorporated,

10202 Washington Boulevard,

Culver City, California.

Attention: Mr. Floyd Hendrickson

Dear Sirs:

FERNAND GRAVET

As requested by Mr. Leon Levy, we enclose a statement showing the estimated 1938 income and taxes thereon of Mr. Gravet on the bases indicated by the statement. As arranged with Mr. Levy, in making these computations it has been assumed that both Federal and California income taxes would be paid during 1938. If payment of the California income tax is delayed until 1939 there may be a saving of from \$500 to \$2,000 of such tax. Also, if all or part of the Federal income tax can be paid or construed as having been paid in 1939, there should be a substantial saving in both Federal and California income taxes.

We shall be pleased to discuss this matter with you at your convenience.

Yours very truly,

Price, Waterhouse & Co.

Enclosure—

Statement

Copy to—

Messrs. Loeb & Loeb [218]

(Defendant's Exhibit S)

LOEW'S INCORPORATED

Estimated 1938 income and taxes thereon of Fernand Gravet under contract acquired by Loew's Incorporated at the salary payments indicated assuming (1) the income is community property income, (2) the Gravets are resident aliens and (3) the taxes are paid or constructively paid in 1938 and ignoring (1) credits for personal exemption, (2) earned income credits and (3) income and deductions from other sources

	<u>Salary payments by Loew's Incorporated</u>					
	14 weeks at \$6,000	15 weeks at \$6,000	16 weeks at \$6,000	17 weeks at \$6,000	20 weeks at \$6,000	14 weeks at \$6,000 plus \$60,000
Income from salary:						
Warner Bros. Pictures, Inc.	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09
Loew's Incorporated	84,000.00	90,000.00	96,000.00	102,000.00	120,000.00	144,000.00
	<u>\$ 94,204.09</u>	<u>\$100,204.09</u>	<u>\$106,204.09</u>	<u>\$112,204.09</u>	<u>\$130,204.09</u>	<u>\$154,204.09</u>
Deductions:						
Agent's commissions	\$ 8,837.50	\$ 9,437.50	\$ 10,037.50	\$ 10,637.50	\$ 12,437.50	\$ 14,837.50
California income and unemployment insurance taxes (1937) estimated to be included in income from Warner Bros. Pictures, Inc.	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00
	<u>\$ 10,037.50</u>	<u>\$ 10,637.50</u>	<u>\$ 11,237.50</u>	<u>\$ 11,837.50</u>	<u>\$ 13,637.50</u>	<u>\$ 16,037.50</u>
Net income for 1938 before inclusion of Taxes based thereon	<u>\$ 84,166.59</u>	<u>\$ 89,566.59</u>	<u>\$ 94,966.59</u>	<u>\$100,366.59</u>	<u>\$116,566.59</u>	<u>\$138,166.59</u>
Estimated taxes thereon (included as income and deductions where applicable in computations)						
Federal income	\$ 21,352.78	\$ 24,384.22	\$ 27,830.68	\$ 31,830.60	\$ 47,432.50	\$ 78,159.18
California income	6,152.20	7,001.20	7,984.80	9,043.02	13,167.16	20,724.32
California unemployment insurance	1,128.64	1,222.34	1,321.70	1,427.28	1,790.16	2,395.06
Federal old age benefits	60.00	60.00	60.00	60.00	60.00	60.00
	<u>\$ 28,697.62</u>	<u>\$ 32,667.76</u>	<u>\$ 37,203.18</u>	<u>\$ 42,360.90</u>	<u>\$ 62,449.82</u>	<u>\$101,338.56</u>
Less taxes withheld by Warner Bros. Pictures, Inc. (1938):						
Federal income	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41
California income	88.08	88.08	88.08	88.08	88.08	88.08
Federal old age benefits	30.00	30.00	30.00	30.00	30.00	30.00
California unemployment insurance	102.04	102.04	102.04	102.04	102.04	102.04
	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.03</u>
Taxes to be borne by Loew's Incorporated	<u>\$ 27,457.09</u>	<u>\$ 31,427.23</u>	<u>\$ 35,962.65</u>	<u>\$ 41,120.37</u>	<u>\$ 61,209.29</u>	<u>\$100,098.03</u>
Total cost to Loew's Incorporated	<u>\$111,457.09</u>	<u>\$121,427.23</u>	<u>\$131,962.65</u>	<u>\$143,120.37</u>	<u>\$181,209.29</u>	<u>\$244,098.03</u>

[Endorsed]: Case No 3002 Mertens vs Rogan. Defts Exhibit S Date 4/3 44 No S in Evidence Clerk, U S District Court, Sou. Dist. of Calif Louis J Somers, Deputy Clerk

[219]

Mr. Mitchell: We offer another letter from Price-Waterhouse that has been handed to me by the witness, addressed to Loew's Incorporated and dated August 12, 1938, relating to the Fernand Gravet taxes, as defendant's next exhibit in order.

* * * * *

The Court: The objection is overruled. It may be received.

The Clerk: Defendant's Exhibit T. [295]

(The document referred to was marked Defendant's Exhibit T, and was received in evidence.)

[DEFENDANT'S EXHIBIT T]

PRICE, WATERHOUSE & CO.

530 West Sixth Street
LOS ANGELES

August 12 1938

Mr. Warren:

This corroborates recent memo to you on the subject of Fernand Gravet taxes.

JRW

Loew's Incorporated,
10202 Washington Boulevard,
Culver City, California.

Attention: Mr. John Melbourne

Dear Sirs:

FERNAND GRAVET

We have reviewed the copies of the revised agreements with Mr. Fernand Gravet loaned to us by Mr. Leon Levi

(Defendant's Exhibit T)

of Messrs. Loeb and Loeb. The revised agreements provide that Mr. Gravet is to receive a "basic compensation" of \$120,000 for his services in "The Great Waltz". Therefore in closing the cost accounts for the picture it seems reasonable to provide a reserve of approximately \$61,000 for taxes as estimated in the next to the last column of the schedule attached to our letter of July 27 1938. A copy of this schedule is enclosed so that it may be attached to the journal voucher.

Yours very truly,

Price, Waterhouse & Co.

Enclosure—

Schedule

Copy to—

Messrs. Loeb and Loeb [220]

(Defendant's Exhibit T)

LOEW'S INCORPORATED

Estimated 1938 income and taxes thereon of Fernand Gravet under contract acquired by Loew's Incorporated at the salary payments indicated assuming (1) the income is community property income, (2) the Gravets are resident aliens and (3) the taxes are paid or constructively paid in 1938 and ignoring (1) credits for personal exemptions (2) earned income credits and (3) income and deductions from other sources

	Salary payments by Loew's Incorporated					
	14 weeks at \$6,000	15 weeks at \$6,000	16 weeks at \$6,000	17 weeks at \$6,000	20 weeks at \$6,000	14 weeks at plus \$60,000
Income from salary:						
Warner Bros. Pictures, Inc.	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09	\$ 10,204.09
Loew's Incorporated	84,000.00	90,000.00	96,000.00	102,000.00	120,000.00	144,000.00
	<u>\$ 94,204.09</u>	<u>\$100,204.09</u>	<u>\$106,204.09</u>	<u>\$112,204.09</u>	<u>\$130,204.09</u>	<u>\$154,204.09</u>
Deductions:						
Agent's commissions	\$ 8,837.50	\$ 9,437.50	\$ 10,037.50	\$ 10,637.50	\$ 12,437.50	\$ 14,837.50
California income and unemployment insurance taxes (1937) estimated to be included in income from Warner Bros. Pictures, Inc.	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00	1,200.00
	<u>\$ 10,037.50</u>	<u>\$ 10,637.50</u>	<u>\$ 11,237.50</u>	<u>\$ 11,837.50</u>	<u>\$ 13,637.50</u>	<u>\$ 16,037.50</u>
Net income for 1938 before inclusion of Taxes based thereon	<u>\$ 84,166.59</u>	<u>\$ 89,566.59</u>	<u>\$ 94,966.59</u>	<u>\$100,366.59</u>	<u>\$116,566.59</u>	<u>\$138,166.59</u>
Estimated taxes thereon (included as income and deductions where applicable in computations):						
Federal income	\$ 21,352.78	\$ 24,384.22	\$ 27,836.68	\$ 31,830.60	\$ 47,432.50	\$ 78,159.18
California income	6,156.20	7,001.20	7,984.80	9,043.02	13,167.16	20,724.32
California unemployment insurance	1,128.64	1,222.34	1,321.70	1,427.28	1,790.16	2,395.00
Federal old age benefits	60.00	60.00	60.00	60.00	60.00	60.00
	<u>\$ 28,697.62</u>	<u>\$ 32,667.76</u>	<u>\$ 37,203.18</u>	<u>\$ 42,360.90</u>	<u>\$ 62,449.82</u>	<u>\$101,338.50</u>
Less taxes withheld by Warner Bros. Pictures, Inc. (1938):						
Federal income	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41	\$ 1,020.41
California income	88.08	88.08	88.08	88.08	88.08	88.08
Federal old age benefits	30.00	30.00	30.00	30.00	30.00	30.00
California unemployment insurance	102.04	102.04	102.04	102.04	102.04	102.04
	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>	<u>\$ 1,240.53</u>
Taxes to be borne by Loew's Incorporated	<u>\$ 27,457.09</u>	<u>\$ 31,427.23</u>	<u>\$ 35,962.65</u>	<u>\$ 41,120.37</u>	<u>\$ 61,209.29</u>	<u>\$100,098.00</u>
Total cost to Loew's Incorporated	<u>\$111,457.09</u>	<u>\$121,427.23</u>	<u>\$131,962.65</u>	<u>\$143,120.37</u>	<u>\$181,209.29</u>	<u>\$244,098.00</u>

[Endorsed]: Case No. 3002 Mertens vs. Rogan Defts Exhibit T Date 4/3/44 No. T in Evidence Clerk U District Court, Sou. Dist. of Calif. L. J. Somers, Deputy Clerk.

[221]

(Testimony of George A. Warren)

* * * * *

The Witness: Here are some letters from Price-Waterhouse to Fernand Gravet.

Mr. Mitchell: Oh, just copies.

The Witness: Just copies. Here is an original.

Mr. Mitchell: Now, we have finished item 3 in the subpoena. The cancelled checks payable to the order of the plaintiff. I don't like to introduce all of them, but I would like the record show the period they cover and the number of checks during 1938.

Mr. Zeitzius: He has a complete set in anticipation that you might want to introduce them all.

The Witness: Here are photostats.

Q. By Mr. Mitchell: Mr. Warren, before offering these checks, can you testify from the checks whether any of them represent tax payments made by Loew's Incorporated on behalf of either plaintiff?

Mr. Zeitzius: I submit that the checks should be allowed to speak for themselves. They probably bear endorsements and I don't think the witness—

Mr. Mitchell: I will ask the witness to pick out those particular checks, if any [296]

The Court: Pick out the checks that represent tax payments during that year.

Mr. Mitchell: During 1938.

A. None of these checks represent tax payments.

Q. They all represent payments of salary or commissions owed by the plaintiffs to their business agent Schulburg?

A. I believe that is correct.

(Testimony of George A. Warren)

Q. I have never seen them, of course. Let us check them.

A. These are all listed here. I have the Schulburg checks listed down here with the voucher number, the check number, date of the check.

Mr. Mitchell: I am willing to accept this summary of the witness.

The Court: All right.

Mr. Mitchell: If he testifies it is correct.

Q. By the Court: You made it yourself?

A. I made it myself from the cancelled checks.

Q. By Mr. Mitchell: It reflects all of the checks which you now have before you?

A. All the checks.

Q. The amounts and the payee?

A. Yes. The payee is not very clearly stated. It is Gravet here, Schulburg here (indicating).

Q. The top computation is Gravet and the bottom one is Schulburg, the business agent? [297]

A. That is correct.

Mr. Mitchell: We offer this summary, then, as the next exhibit.

The Court: It may be received.

The Clerk: U.

(The document referred to was marked Defendant's Exhibit U, and was received in evidence.)

Mr. Zeitzius: Don't you want to add the checks, too?

Mr. Mitchell: That would encumber the record.

Mr. Zeitzius: It is understood none of the checks are payable to a collector of internal revenue.

The Court: No. This is the basic salary paid.

(Testimony of George A. Warren)

Mr. Mitchell: These are basic salaries.

The Court: The whole \$120,000.

Mr. Zeitzius: That is right. That is my understanding. They are either payable to Schulburg or Gravet.

The Court: That is right.

Q. By Mr. Mitchell: Have you any checks of Loew's Incorporated called for in item 5 of the subpoena, representing the approximate sum of \$40,017.41 evidencing the payment or advancement of that amount to the plaintiffs for federal income taxes?

The Court: He produced that. He said it was a bookkeeping entry, it was cash. Don't you remember they cashed his check, and they would only take the cash? And then he produced the ledger sheet to show how it was done. [298]

Mr. Mitchell: That is right.

The Court: Don't you remember that?

Mr. Mitchell: That is right. No checks were issued by Loew's to obtain that cash.

The Court: No. They gave him the \$40,000 cash.

The Witness: To obtain the cash we issued a check for \$40,000.

The Court: To obtain the cash?

The Witness: To obtain the cash.

Q. By Mr. Mitchell: Have you the cancelled check?

A. (Producing document.)

Q. Did you exhibit voucher M13-3 that is written in this check yesterday?

A. Last Friday.

Q. Or last Friday? A. Yes.

Q. Where is the number?

A. (Witness indicating.)

(Testimony of George A. Warren)

Mr. Mitchell: Oh, yes.

The Court: Here is the ledger sheet.

Mr. Mitchell: Yes; that is the ledger.

The Court: It is 22.

Mr. Mitchell: All right. I don't think there is any necessity of introducing that, unless counsel for plaintiffs wants to introduce it.

Mr. Zeitzius: I have no objection if you will introduce [299] it, if you care to, to complete your picture.

The Court: All right; let us take one copy, then. It is a short one, gentlemen, and it won't add much to the record. It is a tremendous record already. The voucher—what is this, a cashier's check? Yes.

Mr. Zeitzius: No. That is a cancelled check from Loew's Incorporated.

The Witness: It is a cancelled check of Loew's Incorporated payable to the Bank of America.

The Court: On which they got the cash?

The Witness: On which we got two cashier's checks to the amount of \$36,000 and \$4,000 in cash.

The Court: That is right. It shows on the back here 17,000, 19,000, and then 4,000.

Mr. Zeitzius: And then the note, your Honor, I would like to state at this time, also showed by White that they had cashed the cashier's checks.

The Court: Yes; I remember that. They would not take it, and they went down and brought the cash. They would not take any chances.

The Clerk: This will be Exhibit V.

(The document referred to was marked Defendant's Exhibit V, and was received in evidence.)

(Testimony of George A. Warren)

Q. By Mr. Mitchell: Mr. Warren, calling your attention to Defendant's Exhibit E—

May I have Defendant's Exhibit E? [300]

Mr. Zeitzius: Now Plaintiffs' Exhibit 20.

Mr. Mitchell: That is right; Plaintiffs' Exhibit 20. It is the LeRoy contract, paragraph 20. This is the LeRoy contract May 6, 1936.

Q. By Mr. Mitchell: Mr. Warren, calling your attention to paragraph 20, on page 9, starting out:

"Should any dispute or controversy arise between the parties hereto with reference to this contract or the employment herein provided for, such dispute or controversy shall be referred for determination to a committee consisting of five foundation members of the Actor's Branch of the Academy of Motion Picture Arts and Sciences," etc., and providing for an appeal to the Conciliation Committee of the same organization, I will ask you now whether the question of the proper amount owed by Loew's Incorporated to Mr. Gravet on account of his and his wife's 1938 federal income taxes—was that question of that amount ever submitted for arbitration to any five foundation members of the Actor's Branch of the Academy of Motion Picture Arts and Sciences?

Mr. Zeitzius: I haven't any objection to letting the truth be known, whatever it may be, but I want to call attention to the fact that, first of all, I think he should ask the witness if the witness knows whether any dispute with respect to taxes has ever been submitted to, or ask him in the form he wishes, any committee. [301]

The Court: I do not know how the witness would be in a position to state. He is not an executive. He is an accountant.

(Testimony of George A. Warren)

Mr. Mitchell: Well, this witness was subpoenaed at the request of the vice-president. I told him I did not want to inconvenience anyone, and he gave me the name of this witness.

The Court: All right. I will overrule the objection.

Mr. Zeitzius: My second point is this, your Honor: I call your attention to Plaintiffs' Exhibit 2 in evidence, which says in paragraph number 1, after referring to the payment of taxes in the United States on the compensation involved in "The Great Waltz": "The provisions of this paragraph"—

Mr. Mitchell: What paragraph?

Mr. Zeitzius: Paragraph numbered 1 of Plaintiffs' Exhibit 2. "The provisions of this paragraph 1 shall be in lieu and in stead of any and all provisions with respect to the payment of taxes contained in my contract of employment with Mervyn LeRoy dated May 6, 1936, as the same may have heretofore been amended and/or extended."

The Court: The effect of it may be there.

Mr. Zeitzius: So that this contract he is asking the witness about has been modified.

The Court: I will allow it to be gone into. Ultimately a man for whose benefit a contract is made has a right to [302] surrender a benefit. Overruled.

The question is: Was there any dispute between them referred to any committee, so far as you know, relating to taxes?

A. Not to my knowledge.

(Testimony of George A. Warren)

Q. By Mr. Mitchell: Was any suit or litigation between Loew's Incorporated and the two plaintiffs ever determined by any other court arising out of the employment of Mertens by Loew's Incorporated?

A. I would not be in a position to definitely answer that question. I would say, to the best of my knowledge, no.

Mr. Mitchell: Will counsel stipulate that that is the fact?

Mr. Zeitzius: I know of absolutely no dispute arising with respect to taxes, other than that you may argue and I will refute in connection with some letters that are in evidence. There has been no dispute whatsoever that I know of with respect to the terms of employment here, except between the government and the taxpayer.

The Court: All right.

Mr. Mitchell: And none has ever been adjudicated in any court or before any board of arbitration.

Mr. Zeitzius: I would say absolutely "Yes;" I know of no—haven't any knowledge that would even put me on notice to that effect. [303]

* * * * *

Mr. Mitchell: Defendant rests, unless he has forgotten something. I don't know that I have overlooked anything.

The Court: That is a reservation.

Mr. Zeitzius: I would like to put Mr. Levi on the stand.

The Court: All right, let us close the testimony.

LEON LEVI,

recalled as a witness by and on behalf of the Plaintiffs in rebuttal, having been previous duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Zeitzius:

Q. You have previously testified in the case, Mr. Levi?

A. Yes, sir.

Q. And you have been sworn.

What exhibit number is the letter of September 16, 1938, to Mr. Mannix, a defendant's exhibit.

The Clerk: 9-13-38. It is Defendant's Exhibit 2.
[304]

Mr. Zeitzius: That is right.

Q. I hand you Defendant's Exhibit 2, the original of Defendant's Exhibit 2, with a letter attached and envelope, and ask you if you ever saw that before?

A. Well, I am not sure that I ever saw this original. I think I did. But I have seen a copy of it.

Q. Do you recall when you saw the copy, approximately?

A. Yes. I first saw the copy on September 14th, 1938, the day after the letter is dated.

Q. Will you state whether you did anything upon receiving the copy of this exhibit 2?

A. Yes.

Q. Please state who you saw and what you did?

A. Well, it is my recollection that on September 14th Loew's Incorporated sent me by special messenger a copy of this letter as soon as they received it. And I think that the first thing that I did after that was to contact Mr. Singer by telephone and I had quite an argument

(Testimony of Leon Levi)

and discussion with him over the telephone. My reason for calling him was that on reading this letter it was quite apparent to me that it had been written by Mr. Singer—

Mr. Mitchell: I move that that answer, a portion of the answer, be stricken as a conclusion.

The Court: That may go out.

A. So I called—

Q. By Mr. Zeitzius: Did Mr. Singer admit writing the [305] letter?

A. Mr. Singer did admit—Mr. Singer told me that he wrote the letter. And I told him that I was quite upset by it; that it was completely out of accordance with the facts; that it did not at all represent the agreement that I had made on behalf of Loew's Incorporated with Mr. Gravet.

Mr. Mitchell: Just a moment before you go on with that conversation. I would like to know where it took place and who Mr. Singer was.

A. The conversation took place, I have already said, over the telephone. I was in my office and Mr. Singer was in his office. Mr. Singer was an accountant who was employed by Mrs. Schulburg who, I think the evidence shows, was Mr. Gravet's agent.

Mr. Mitchell: I see.

A. Mr. Singer—I had had quite an argument and unpleasant discussion, series of dealings with Mr. Singer just prior to that in connection with another case where he became involved. It was a different studio.

The Court: Let us get down to this one, Mr. Levi.

A. Well, I just point out that because I want to say that we had a lot of unpleasant discussion about this

(Testimony of Leon Levi)

letter, too, which finally ended up with my telling Mr. Singer that I was going to talk to Mr. Gravet about it and secure his repudiation of the letter. I think it was the next day that I met with Mr. Gravet. It may have been — [306]

Mr. Mitchell: Now, just a moment, just a moment. Mr. Gravet, under his return, was to sail on the Normandie on September 14 and you received this letter September 15, is that correct?

A. No. I believe I received this letter September 14th, and it is my recollection that Mr. Gravet was still here at that time.

The Court: All right; go ahead.

Q. By Mr. Zeitzius: Did you see him after you got that letter or a copy of it?

A. It is my recollection, yes, that I had another meeting with him after I received this letter. I am quite certain that is the case. I don't know exactly on what day he left Los Angeles, but I am very certain that I discussed this letter with him after it was received at the studio.

Q. Where did your discussion occur with him?

A. I believe at the studio. In fact, that is my recollection, that I made an appointment to meet him at the studio and went out there to talk to him about it, and at that time I told him that this letter was completely out of accordance with the facts, with the conversations that we had previously had and with the letter that I had written to him.

And I explained to him that the money had already been advanced by Loew's Incorporated; that at the time it was advanced it was with the understanding that it was

(Testimony of Leon Levi)

to be [307] treated as a loan, and that I could not understand why he would now permit Mr. Singer to put him in a position where he was writing a letter repudiating that agreement after the money had been paid with that understanding. And the upshot of the conversation was that the letter was completely repudiated by Mr. Gravet to me.

He told me that he had not understood it; that it had been dictated by Mr. Singer; that he did not understand the implication of it and wanted us to ignore it. And why this letter was still in the file of Loew's Incorporated I can't tell you, because the letter should have been destroyed at that time.

Q. Do you recall anything else that was said by Mr. Gravet in repudiation of the letter?

A. No; just that the arrangement that had been made and the understanding that he had had in his conversations with Mr. White and myself would continue in force.

Q. Are you familiar with Government's Exhibit A, a letter dated September 8, 1938, to which Mr. Gravet's letter appears to be a reply, the one that you just discussed under Exhibit 2?

A. Yes. I testified as to this letter the other day and stated that I had dictated it.

Q. Did the subject of this letter come up in this conversation?

A. The subject of that letter and of the conversation [308] that Mr. Gravet had had with Mr. White on the day of obtaining his sailing clearance and the conversation that I had had with him a day or two before he went down to the Collector's Office, because at all three of those times it had been said and understood by both Mr. Gravet and us that the money was to be treated as a loan.

(Testimony of Leon Levi)

Mr. Mitchell: I move the word "understood" be stricken as a conclusion.

The Court: Well, that may go out. I think you have already testified to the import of those conversations.

Q. By Mr. Zeitzius: Since your conversation of about September 14th with Mr. Gravet did anything occur at any time subsequent thereto in which Mr. Gravet took a position contrary, again, one way or another?

A. Nothing occurred in which Mr. Gravet took the position contrary. Mr. Singer came into the picture, as I recall it, once several months later, when Mr. Gravet sent some papers back to this country from France, sent them to Singer to be forwarded to Price-Waterhouse, and Mr. Singer, as I recall it, forwarded them with a letter in which he demanded or suggested certain commitments. But that, again, was ignored, because Mr. Singer, as far as either Mr. White or myself knew—Mr. Singer had no place, no proper place in this whole proceeding.

Q. So far as you know, he has never been employed with respect to 1938 or the contract of employment involved [309] in this suit?

A. So far as I know, he has never been employed by Gravet. He was employed by Mrs. Schulburg, but not in connection with 1938 taxes of Gravet.

The Court: Any further questions?

Mr. Zeitzius: No further questions.

The Court: All right, Mr. Mitchell.

Cross-Examination

By Mr. Mitchell:

Q. You mean, Mr. Levi, that the signature on this letter is not Mr. Gravet's signature?

(Testimony of Leon Levi)

The Court: No. Mr. Gravet admitted that that was his signature. Looks like the same signature.

Mr. Mitchell: It does to me.

The Court: He said it was dictated by him. He did not say it was signed.

Mr. Mitchell: Will counsel for the plaintiffs stipulate that the stamp in the upper right hand corner of this letter of September 13, Defendant's Exhibit 2, the one dated September 14, stamped, is "F. L. H." and that it indicates that it was received on September 14, 1938, by—what is the name, Mr. Warren?

Mr. Warren: F. L. Hendrickson.

Mr. Mitchell: —F. L. Hendrickson, vice-president of Loew's Incorporated.

Mr. Warren: No. He is in charge of the legal department. [310]

* * * * *

Los Angeles, California, Tuesday, April 4, 1944.
2:00 P. M.

The Court: All right, gentlemen, let us proceed.

* * * * *

Mr. Mitchell: I find one little matter that I overlooked, and would request that we re-open for that matter only. It is with regard to our notice to produce which was served upon counsel sometime before the trial. And we will ask plaintiffs' counsel now whether there are any documents in the custody of plaintiffs' counsel or plaintiffs, described in the notice to produce, which are available and which have not either been produced here, offered into evidence or in evidence?

Mr. Zeitzius: My best recollection is there are not. I went carefully through my file after getting your notice and I found that all the documents were in the possession of either Price-Waterhouse or Loew's. We had copies. And I want to congratulate you on having dug up everything that possibly could be brought forth.

Mr. Mitchell: Very well. I wanted the record to be complete on that point before defendant rested. Now defendant rests.

[Endorsed]: Filed Nov. 21, 1944. [313]

[Endorsed]: Filed Nov. 24, 1944. Paul P. O'Brien, Clerk.

[Endorsed]: No. 10933. United States Circuit Court of Appeals for the Ninth Circuit. Ethel Strickland Rogan, as executrix of the Last Will and Testament of Nat Rogan, deceased, Appellant, vs. Fernand Mertens, also known as Fernand Gravet and Victorine Catherine Renourd Mertens, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 24, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10933

ETHEL STRICKLAND ROGAN, Executrix of the Last
Will and Testament of NAT ROGAN, Deceased,

Appellant,

v.

FERNAND MERTENS, also known as FERNAND
GRAVET and VICTORINE RANOURD MER-
TENS,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

On appeal from the judgment in the above-entitled ac-
tion, the appellant will urge and rely upon the following
points, to wit:

The District Court erred:—

1. In holding that the amount of appellees' 1938 in-
come tax paid by appellee-husband's employer in June and
September of such year did not constitute then taxable
income of appellees.

2. In holding that the amount of such income tax
paid by the appellee-husband's employer constituted a
loan to the husband.

3. In holding that the amount of such tax payments
did not constitute realized income in the taxable period
when such taxes were due and payable.

4. In that Findings 12 and 14 and Conclusion 4 are
not supported by substantial evidence.

5. In that Conclusions 3, 4, 5, 6 and 7 are contrary to the law, and are not supported by the Findings or by substantial evidence.

6. In the alternative, (a) in impliedly holding that the appellee-husband became contractually and unconditionally obligated to pay to his employer any amount certain by virtue of such tax payments, (b) in impliedly holding that the appellee-husband's liability, if any, to pay all or any part of such monies to his employer was not contingent, (c) in impliedly holding that such taxes were not so paid by the employer under a "claim of right" made by appellee-husband and (d) in impliedly holding that the appellees did not have the use, enjoyment and benefits of such tax payments at the time they were made.

7. In the alternative in holding that the complaint states a claim upon which relief can be legally granted the appellee-wife, and in ordering a judgment in favor of the appellee-wife.

8. In that the findings do not support the judgment.

9. In that the evidence does not support the findings.

Dated: November 15, 1944.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

By E. H. Mitchell

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 24, 1944. Paul P. O'Brien, Clerk.

No. 10933
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the Last
Will and Testament of Nat Rogan, deceased,

Appellant,

vs.

FERNAND MERTENS, also known as Fernand Gravet and
VICTORINE CATHERINE RENOURD MERTENS,

Appellees.

Upon Appeal from the District Court of the United States
for the Southern District of California.

BRIEF FOR THE APPELLANT.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,

RIGMOR O. CARLSEN,
Special Assistants to the Attorney General.

CHARLES H. CARR,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

United States Postoffice and
Courthouse Bldg., Los Angeles (12),

FILED

APR 27 1915

PAUL P. O'BRIEN,
CLERK

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No. 10933

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the Last
Will and Testament of Nat Rogan, deceased,

Appellant,

vs.

FERNAND MERTENS, also known as Fernand Gravet and
VICTORINE CATHERINE RENOURD MERTENS,

Appellees.

BRIEF FOR THE APPELLANT.

Opinion Below.

The opinion of the District Court [R. 19-21] is reported
at 56 F. Supp. 450.

Jurisdiction.

This is a suit to recover income taxes for the calendar
year 1938 in the total amount of \$18,399.30, or the sum of
\$9,199.65 by each taxpayer, together with interest thereon
as provided by law. On June 21, 1938, taxpayer, Vic-
torine Catherine Renourd Mertens, paid to the Collector
the sum of \$3,245.92. [R. 24.] On September 7, 1938,
taxpayer, Fernand Mertens, paid to the Collector the
amount of \$19,649.39 on his own behalf, and the amount
of \$17,423.88 as the balance due on behalf of his wife,

Victorine Catherine Renourd Mertens. [R. 27.] The above amounts, together with the sum of \$1,020.41 previously withheld from plaintiff Fernand Mertens' income aggregated a tax payment in the sum of \$20,669.80 by each taxpayer respectively, for the calendar year 1938. [R. 27.] On March 5, 1940, each taxpayer filed a claim for the refund of \$9,199.65. [R. 28.] On July 11, 1941, by letters addressed to each of the taxpayers, the Commissioner gave official notice of the rejection of the claims. [R. 29.] Prior to June 30, 1943, the taxpayers instituted an action in the District Court for the recovery of \$18,399.30, with interest, against Nat Rogan, he being then the duly appointed, qualified and Acting Collector of Internal Revenue for the Sixth Collection District, California. [R. 3, 22-23.] On August 8, 1943, Nat Rogan died, and on October 8, 1943, Ethel Strickland Rogan, his widow, was by order of the Superior Court of the State of California, in and for the County of San Diego, duly appointed executrix of the last will and testament of Nat Rogan, and on that date she duly qualified as such executrix. [R. 2, 23.] An amended complaint was filed herein on October 28, 1943, in which the aforesaid executrix, as executrix of the deceased Collector, was duly substituted and served as defendant herein. [R. 2-9.] On May 29, 1944, the District Court entered judgment against appellant allowing the claims of taxpayers in the sum of \$8,802.40, respectively, together with interest thereon. [R. 32-33.] Notice of appeal was filed on August 28, 1944. [R. 34.] Jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925. Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code.

Question Presented.

Whether the amount paid or advanced by taxpayer-husband's employer for taxpayers as federal income tax for 1938 was received as income by taxpayers in 1938 and therefore constituted taxable income for that year, or whether the transaction constituted a loan.

Statutes Involved.

The applicable statutes are printed in the Appendix, *infra*.

Statement.

The pertinent facts, taken from the facts found by the District Court [R. 22-29], the stipulation of the parties [R. 40-44], and from exhibits furnished on behalf of taxpayers at the trial [R. 55-62, 90-117, 230-233] may be stated as follows:

Fernand Mertens, also known as Fernand Gravet, and Victorine Catherine Renourd Mertens are husband and wife, married under the law of France, and were resident aliens of the United States during all of 1938, residing in Los Angeles County, California. [R. 22.] During 1938 and prior to July 29th thereof, Fernand Mertens rendered services as an actor for Warner Brothers Pictures, Inc., at Los Angeles, California, and was paid therefor the sum of \$10,204.09, which item of gross income is not in dispute. [R. 23.] Prior thereto, on May 6, 1936, Mertens had entered into a written contract of employment with one Mervyn LeRoy whereby he [Mertens] agreed to render certain services as actor at a stated salary. [R. 230.] By the terms of this contract the employer agreed "to pay all taxes which Artist may be assessed in the

United States, but not his taxes in France, and only for such sums which Artist derives from his employment through Employer." [R. 231.] This contract was subsequently assigned to Loew's, Incorporated (hereinafter designated Loew's), subject to the restriction that by its [Loew's] acceptance of the same, it assumed no liability under the contract except as arose subsequently to April 15, 1938, in connection with the photoplay entitled "The Great Waltz." [R. 56.] By the terms of this agreement, Loew's agreed to pay "all taxes which may lawfully be assessed against me [Mertens] in the United States", but only to the extent that they were based upon sums derived by him from services connected with the photoplay "The Great Waltz." [R. 25, 60.] The contract further provided that both parties thereto should use every effort "to the end that said taxes will be paid by September 10, 1938." [R. 60.]

In accordance with the terms of this agreement, Loew's paid Fernand Mertens compensation for his services in the total sum of \$120,000 during 1938, prior to September 14, of that year, exclusive of any amounts which may have been paid on account of taxes. [R. 25, 42.] All of the income received by taxpayers was community property. [R. 24.]

On June 21, 1938, Victorine Catherine Renourd Mertens, desiring to go to France, went to the office of Collector of Internal Revenue, Nat Rogan, at Los Angeles, for the purpose of obtaining a certificate of compliance with the internal revenue laws. She was required to file on that date, as a resident alien, a departing alien income tax return on Treasury Department Form 1040-C, for the period beginning January 1, 1938, and ending June 30,

1938, and reported thereon one-half of the then assumed earnings of the husband received during such period to June 30, 1938. The tentative tax computed thereon was the sum of \$3,245.92 which Mrs. Mertens paid to the Collector, after which, on June 30, 1938, she departed from the United States for Paris, France. [R. 24.] The Court found that the funds with which this tax was paid were loaned by Loew's Incorporated, and duly recorded on the latter's books as a loan.¹ [R. 24.]

Thereafter, on or before August 30, 1938, Fernand Mertens advised the Collector that he intended to depart the United States for France on or about September 14, 1938, and desired to obtain the necessary certificate of compliance with the internal revenue laws. Before issuing the certificate, the Collector recomputed the tentative federal income tax liability of Mrs. Mertens in respect to one-half of the community property income of taxpayers earned between January 1, 1938, and September 14, 1938, inclusive, and estimated her tax liability for that period to be \$20,669.80. A similar computation of tentative tax liability was made in the amount of \$20,669.80 by the Collector for Fernand Mertens with respect to his half of the community. In making these computations the Collector included in taxpayers' community property incomes, the total sum of \$40,017.41 as his estimate of the amount of tax to be payable by Loew's, on the ground that it would be income "constructively received" from Loew's, in 1938. [R. 24-25.]

¹The finding that these funds were loaned by Loew's is claimed by appellant to be erroneous as being without substantial evidence to support it, and as being a conclusion of law not supported by the findings of fact. See Argument, *infra*.

The sum of \$40,017.41 so included by the Collector as part of taxpayers' income for the year 1938 was algebraically computed and built up by pyramiding taxes under the Collector's theory that such amount represented the liability of Loew's under the agreement of July 29, 1938, above referred to. [R. 25.]

The court further found that when Mertens and Loew's, on or before August 30, 1938, were advised by the Collector that the aggregate taxes would be computed and payment would be demanded in an amount in excess of \$40,000, based upon the Collector's insistence that an amount of \$40,017.41 would have to be added to income before any certificate of compliance would be issued, the parties to the agreement of July 29, 1938, promptly substituted a new agreement whereby it was agreed that Loew's should advance the amount which was going to be demanded by the Collector as a loan, to be adjusted later when the full tax liability had actually been determined and ascertained; and that this could not be done until after the taxable year had ended.² [R. 26.]

The court further found that on September 7, 1938, the Collector prepared on Treasury Department Forms 1040-C, departing alien income tax returns, one for each taxpayer, for the period from January 1, 1938, to September, 1938, and included therein, in addition to the sum of \$40,017.41 estimated to be an amount "constructively received" from Loew's, all income derived by taxpayers from all sources within and without the United States during

²These findings are challenged by appellant as not justifying the conclusion of a loan, under the law applicable thereto. See Argument, *infra*.

the period from January 1, 1938, through September 14, 1938, resulting in an aggregate claimed net income of \$154,850.21, of which one-half or \$77,425.10 was included in each return; that the total tax liability shown on each return was \$20,669.80; that the total tax for both parties was shown as \$41,339.60, of which \$301.78 represented the total tax attributable to taxpayers' French community property incomes; and that after deducting \$1,020.41, representing tax withheld and paid by Warner Brothers, there remained a combined tax balance of \$40,017.41,³ which was also the exact amount which the Collector included in taxpayers' community incomes as "constructively received" from Loew's, Inc. [R. 26-27.]

The court found that Fernand Mertens executed and filed with the Collector these returns both for himself, and under a power of attorney, for his wife; that on the date of such execution and filing, namely, September 7, 1938, the amounts of \$19,649.39 and \$17,423.88 were paid to the Collector by taxpayers, which amounts together with the amounts previously shown to have been paid or withheld aggregated \$20,669.80 each for the respective taxpayers; that thereupon certificates of compliance with the internal revenue laws were issued to them as of September 7, 1938, and that Fernand Mertens thereafter, on or about September 15, 1938, left the United States for France, without surrendering his status as a resident alien of the United States. [R. 27.] The taxpayers were on the cash receipts and disbursements basis of accounting and filed their returns on such basis. [R. 27, 43.]

³It should be noted that in arriving at the figure of \$40,017.41. the tax on the French community property incomes in the amount of \$301.78 was also deducted from the original total tax of \$41,339.60.

The court found that taxpayers did not file returns for the entire calendar year of 1938 on any printed income tax return forms supplied by the Treasury Department. [R. 28.] It was stipulated between the parties [R. 44] that other than the three departing alien income tax returns executed by taxpayers in June and September, 1938, no income tax return or returns on printed income return forms supplied by the Treasury Department, either original, supplemental, or amendatory, reporting income of either of the taxpayers for the year 1938, or for any part thereof, was or were ever filed with the Treasury Department by the taxpayers, or either of them, prior to the commencement of this action. The court found [R. 28] that schedules were attached to claims for refund subsequently filed which disclosed the total of taxpayers' incomes for the entire year, together with deductions, showing aggregate net incomes slightly less than those shown in the department alien returns of September 7, 1938.

On March 5, 1940, taxpayers each filed a claim for the refund of \$9,199.65 or such amount as is legally refundable, the ground set forth in the claims being that the Collector had erroneously added to their combined community incomes for the period January 1, 1938, through September 14, 1938, the amount of \$40,017.41 as income constructively received in 1938. [R. 28, 90-101, 103-115.] On December 4, 1940, taxpayers filed through their duly authorized representative identical letters of protest upon being advised that an examination of their tax returns for 1938 in connection with their claims for refund did not in the opinion of the Internal Revenue Agent in Charge at Los Angeles disclose any grounds for reduction of their tax liabilities. [R. 29.] The refund claims were rejected by letters dated July 11, 1941, to each taxpayer. [R. 29.]

Additional facts found by the Court below were that the correct amount of tax on taxpayers' community income of \$120,000 and all other income from all other sources after proper deductions was and is \$11,876.40 for each taxpayer for the period in question [R. 25];⁴ that Loew's Incorporated advanced the amount of \$37,073.27 as a loan to taxpayers and entered it on its books accordingly [R. 27-28, 29];⁵ and that the loan arrangement was not a mere bookkeeping matter resorted to with the view of avoiding tax but was a bona fide new arrangement brought on by the erroneous demand of the Collector of Internal Revenue. [R. 28.]⁶

As conclusions of law from the above findings of fact, the Court concluded that the amount of \$40,017.41 was erroneously and unlawfully included in taxpayers' 1938 incomes with respect to which the taxes involved were paid; that the substituted agreement with Loew's Incorporated made on or about August 30, 1938, pursuant to which the loan was made by Loew's was a lawful and binding agreement between the parties and its obligation

⁴This finding is challenged as being without support in the evidence, and as actually constituting a conclusion of law erroneously drawn from the facts found and stipulated to. See Argument, *infra*.

⁵It is appellant's contention that this constitutes a conclusion of law and is without support in the findings of fact and the evidence. See Argument, *infra*.

⁶This is claimed to be error for the reasons heretofore stated.

remains in full force and effect, and that it operated to modify any prior agreements or understandings between the parties; and that each taxpayer herein overpaid his and her respective income taxes for the period from January 1 to September 14, 1938, in the amount of \$8,802.40, and hence they were entitled to judgment against collector in that amount, respectively, with interest, plus costs. [R. 30-31.]

Statements of Points to Be Urged.

The District Court erred:

1. In holding that the amount of appellees' 1938 income tax paid by appellee-husband's employer in June and September of such year did not constitute the taxable income of appellees.

2. In holding that the amount of such income tax paid by the appellee-husband's employer constituted a loan to the husband.

3. In holding that the amount of such tax payments did not constitute realized income in the taxable period when such taxes were due and payable.

4. In that Findings 12 and 14 and Conclusion 4 are not supported by substantial evidence.

5. In that Conclusions 3, 4, 5, 6, and 7 are contrary to the law, and are not supported by the findings or by substantial evidence.

6. In the alternative, (a) in impliedly holding that the appellee-husband became contractually and unconditionally

obligated to pay to his employer any amount certain by virtue of such tax payments; (b) in impliedly holding that the appellee-husband's liability, if any, to pay all or any part of such monies to his employer was not contingent; (c) in impliedly holding that such taxes were not so paid by the employer under a "claim of right" made by appellee-husband and (d) in impliedly holding that the appellees did not have the use, enjoyment and benefits of such tax payments at the time they were made.

7. In the alternative in holding that the complaint states a claim upon which relief can be legally granted the appellee-wife, and in ordering a judgment in favor of the appellee-wife.

8. In that the findings do not support the judgment.

9. In that the evidence does not support the findings.

Summary of Argument.

The law is well established that a taxpayer's income tax in a given taxable period must be computed upon all the taxable income received by him, including that portion which consists of his income taxes paid or advanced for him by a third person for a consideration. This is true, even though there may be a conditional liability on the part of the taxpayer subsequently to repay some or all thereof. Where the original payment on the taxpayer's behalf is made pursuant to a recognized liability on the part of the payor to pay such taxes, the payment constitutes taxable income to the taxpayer in the year in which it is made, re-

gardless of a subsequent contingent liability of repayment.

Such a situation is presented by the evidence and the stipulated facts in the case at bar. The evidence is undisputed that taxpayer's employer originally agreed to pay all of his taxes lawfully assessed arising out of a particular contract within the United States, and to do so within the taxable period. The liability to pay the employee's taxes for the taxable year 1938, insofar as they were "lawfully assessed," was at all times recognized by the employer; the employer actually advanced the taxes demanded by the Collector for 1938 as a condition to the procuring of a certificate of compliance in order to enable the employee and his wife to leave the United States; and it was understood between employer and employee that if any part thereof were subsequently declared "unlawful," the employee was to repay such "unlawfully assessed" portion. The so-called "new" agreement did not alter the rights of the respective parties under the original contract. The District Court's conclusion that a loan was made is contrary to its own findings and the undisputed facts.

Even if it be conceded that some small portion of the amount advanced by the employer herein was in excess of the amount such employer was obligated to pay, such excess would only constitute an overpayment, repayable by the employee. This would not alter the fact that the payment was income to the taxpayer when made.

ARGUMENT.

The Amount of the Taxpayers' Income Taxes Paid by Taxpayer-Husband's Employer in 1938 Constituted Income to the Taxpayers in That Year.

It is well established that a taxpayer's gross income upon which his tax is based must be computed to include all taxable income received by him, including that portion which consists of his income taxes paid by a third person for a consideration. This rule has been applied by the Supreme Court to taxes paid by a lessee for or on behalf of his lessor [*United States v. Boston & M. R. Co.*, 279 U. S. 732, 734; *United States v. Joliet & Chicago R. Co.*, 315 U. S. 44, 47; cf. *United States v. Mahoning Coal R. Co.*, 51 F. (2d) 208 (C. C. A. 6th)); and to an employee's taxes paid by his employer (*Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 729; 2 Mertens, Law of Federal Income Taxation, Sec. 11.28).

Such tax payments constitute income when paid, even though the obligation is contingent upon the taxes being lawfully assessed, and even though a suit attacking the inclusion of the tax in gross income may be contemplated, and may not be finally decided until a later year, and the third party's obligation to pay the tax may be contingent upon such litigation. (*Commissioner v. Terre Haute Elec. Co.*, 67 F. (2d) 697 (C. C. A. 7th), certiorari denied 292 U. S. 624).⁷

⁷In the *Terre Haute* case, *supra*, the lessee's contract to pay lessor's taxes "lawfully assessed" contained a proviso that lessee might, if it so desired, after giving lessor notice, resist by legal proceeding the payment of any tax, in which case the duty to pay would not arise until 30 days after final adjudication thereof by a court of competent jurisdiction. The court held that the additional taxes for the years 1922 and 1923, occasioned by the rejection of lessor's asserted deduction for depreciation were taxable income for the years 1922 and 1923, despite the fact of pending litigation concerning the validity of the tax, because of the lessee's obligation to pay them.

The contracts between Mertens and LeRoy, and between Mertens and Loew's Incorporated, come clearly within the above decisions. The contract between Mertens and LeRoy, dated May 6, 1936, provided that "Employer * * * agrees to pay all taxes which Artist may be assessed in the United States. but not his taxes in France, and only for such sums which Artist derives from his employment through Employer." [R. 231.] This contract was assigned by LeRoy to Loew's Incorporated on July 29, 1938, by two contracts of that date, the terms of the first of which provided that "We [Loew's] have accepted the same with the restriction that by our acceptance of the same we are assuming no liability under said contract except such liability thereunder as has arisen subsequent to April 15, 1938 in connection with the photoplay now entitled "The Great Waltz"," [R. 56]; and the terms of the second of which provided that "You [Loew's] agree to pay all taxes which may lawfully be assessed against me in the United States, but only to the extent that such taxes are based upon sums derived by me from my services in connection with said photoplay now entitled "The Great Waltz". [R. 60.] This second contract likewise contained the provision that both Mertens and Loew's were to "use every effort to the end that said taxes *will be paid by September 10, 1938* and to the end that I [Mertens] shall be free to leave the United States on that date * * *." [R. 60.]⁸ (Italics supplied.)

Two facts are clear from the July, 1938, agreement: (1) Loew's agreed to pay Mertens' taxes lawfully assessed arising out of his contract with Loew's in connection with

⁸These two contracts of July, 1938, will hereafter be referred to as one contract.

his performance of "The Great Waltz," and (2) it was definitely understood that this was to be done prior to Mr. Mertens' proposed departure from the United States in September of 1938.

The alleged occasion for the so-called "new agreement" of August 30, 1938, between Mertens and Loew's upon which the court predicated its finding of a "loan" [R. 26] was the demand of the Collector that all income taxes of the Mertens for 1938 should be paid prior to their departure for Europe. The court below found that the Collector's demand was "erroneous" [R. 28] and that it was therefore understood between the parties that the money should be advanced by Loew's Incorporated as a loan, "to be adjusted later on when the full tax liability had actually been determined and ascertained." [R. 26.]

The finding of a "loan," to the extent that it was a finding of fact at all, is not supported by the record: (1) The demand of the Collector upon which it is allegedly predicated, was not erroneous; (2) the very finding itself, as qualified, does not justify the conclusion that the money advanced was "loaned"; and (3) from the undisputed evidence it is clear that neither party to the "new" contract actually contemplated a loan.

With respect to the Collector's demand, it should be noted that the Collector, in requiring that Mertens and his wife pay their income taxes for the taxable period in question prior to the issuance of a certificate of compliance which would enable them to leave the United States, was not acting arbitrarily, but was required to exact such taxes by the provisions of the Revenue Act of 1938, Section 146, in view of the status of the Mertens as aliens.⁹ By the

⁹See Appendix *infra*, as to the provisions of this statute.

provisions of this statute, the Collector was not only authorized and directed, but required, in situations where an alien was about to depart from the United States prior to the expiration of the taxable year without leaving any security for the payment of his taxes as finally computed when the taxable year had expired, to declare the taxable period immediately terminated, and that the taxes thereupon were immediately payable. The court's finding, therefore, that the tax liability could not be determined "until after the taxable year had ended" [R. 26], if intended to include the whole of the year 1938, was erroneous as a matter of law. No bond was ever furnished or offered, by or on behalf of the Mertens, to avoid or suspend the application of the statute [R. 206]; and no further return was ever filed by either taxpayer to amend the returns filed on or before the date of their respective departures [R. 28, 44], so that the returns as filed in September of 1938, on behalf of Mrs. Mertens and Mr. Mertens respectively, were actually the final returns made for the taxable year 1938. The taxable year in question, therefore, actually ended in September of 1938. Furthermore, the obligation of Loew's to pay these taxes for Mertens prior to the date of departure was, as has already been shown, clearly recognized by Loew's when the original contract was entered into with Mr. Mertens in July of 1938, whereby it was specifically provided that every effort should be made that the taxes should be paid "by September 10, 1938." [R. 60.] There was obviously, therefore, no error on the part of the Collector in making his demand prior to Mertens' departure. Nor was such demand a surprise to either the taxpayer or his employer.

The District Court's findings and the evidence definitely establish that the so-called "new agreement" of August 30,

1938, did not constitute a loan in the legal sense. No definite promise to return the amount loaned, or its equivalent, was ever made (*In re Grand Union Co.*, 219 Fed. 353, 356 (C. C. A. 2d); *Northern Mining Corp. v. Trunz*, 124 F. (2d) 14, 16 (C. C. A. 9th) certiorari denied 316 U. S. 664; *United States v. Mahoning Coal R. R. Co.*, *supra*; *Embola v. Tuppela*, 127 Wash. 285, 220 Pac. 789; *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044; *People ex rel. Talcott, Inc. v. Goldfogle*, 213 A. D. 719, 211 N. Y. S. 122; *Marshall v. Commissioner*, 32 B. T. A. 956; *Kinnear v. Commissioner*, 36 B. T. A. 153, 95 F. (2d) 997 (C. C. A. 9th); 1 Mertens, Law of Federal Income Taxation, Sec. 5.24; *Perrin v. Carbonc*, 1 Cal. App. 295; California Civil Code, Sec. 1912 (Appendix, *infra*)); and the implied obligation to repay any overpayment which may have been advanced certainly was not an unconditional and non-contingent obligation to repay the funds advanced. Such unconditional obligation to repay the amount of a loan is an indispensable characteristic of its very existence in the first instance. *In re Grand Union Co.*, *supra*; *Northern Mining Corp. v. Trunz*, *supra*; *United States v. Mahoning Coal R. R. Co.*, *supra*; *Jennings & Co. v. Commissioner*, 59 F. (2d) 32, 35 (C. C. A. 9th); *Mitchell v. Commissioner*, 89 F. (2d) 873, 876 (C. C. A. 2d), certiorari denied 302 U. S. 723; *Jacobs v. Hoey*, 136 F. (2d) 954, 956 (C. C. A. 2d); *Barker v. Magruder*, 95 F. (2d) 122 (App. D. C.); *Boston Elevated Ry. Co. v. Commissioner*, 131 F. (2d) 161 (C. C. A. 1st), certiorari denied 318 U. S. 760; *Texas & Pacific R. Co. v. United States*, 286 U. S. 285.

Furthermore, the obligation for the return of any overpayment existed on the part of the Mertens in any event, with respect to the advance made by Loew's. under the

previously existing agreement of July, 1938, so the alleged "new agreement" in no way altered the relationship of the parties under their first agreement.

With respect to the alleged "loan" for the payment of Mrs. Mertens' taxes, it should be noted that the *original* July contract between Loew's and Mertens was not entered into until *after* Mrs. Mertens had already sailed for France [R. 24], *after* her first departing alien income tax return had been filed, and *after* her share of the community income taxes, as first computed, had been paid [R. 63], not to speak of any "new agreement" supplemental thereto. Prior to such payment for Mrs. Mertens (on June 21, 1938) and a full month prior to the date of the original Loew's-Mertens contract (July 29, 1938), there had been some discussion between the accountants and attorneys for Loew's as to "whether Loew's Incorporated had any liability *immediately at that time* for the payment of her [Mrs. Mertens] tax; in other words, whether it could be regarded as an immediate lawful assessment." [Italics supplied, R. 204.] However, in spite of that problem in the minds of the accountants and attorneys, no reference whatsoever was made to any loan when the tax for Mrs. Mertens was paid [R. 138-148, 202-205, 233-235], nor was any discussion had with the Collector regarding such a possibility in June of 1938, since the tax was not included in the computation of her share of the community income at that time. [R. 234-235.] In fact, Mr. White, a witness for taxpayers, who was present at the June payment specifically testified when asked whether the question had been discussed (on the occasion of Mrs. Mertens' tax payment) whether the tax should be paid on that particular payment by Loew's, that "there was no

question but that Loew's was to furnish the money." [R. 234.]

It is true that the record [R. 258] shows an inter-office communication in Loew's files, dated June 27, 1938, reciting that

Mr. Craig [apparently of Loew's staff of attorneys] decided that we [Loew's] should treat the amount of tax paid for Mrs. Gravet as an advance or loan. We will also treat the taxes paid for his account when he leaves as a loan or an advance. This situation comes about because a supplementary agreement is being entered into with him making this possible, according to Leon Levi" [attorney for Loew's]. (Italics supplied).

Just what such proposed agreement was to be supplementary to is not apparent from the evidence, since the original contract between Mertens and Loew's had not yet been entered into.

However, more than a month after the above payment for Mrs. Mertens had taken place, and after the above book entry had been made, the *original* contracts between Mertens and Loew's were entered into, July 29, 1938, whereby Loew's agreed to pay all taxes which might "lawfully be assessed" against Mertens [R. 25, 60], and to use every effort that the taxes should be paid by September 10, 1938. Nothing whatever was said therein about any loan having been or to be made. The July contract being an assignment [R. 56] of the prior May, 1936, contract whereby Mertens' then employer agreed to pay Mertens' taxes assessed in the United States [R. 231], it would seem clear that the payment made for Mrs. Mertens in June of 1938 was made pursuant to such acknowledged

liability; and the finding that such payment when made in June of 1938 constituted a "loan" pursuant to a "new agreement" made some time subsequently to the contract of July, 1938, is manifestly without support in the evidence.

Furthermore, with respect to the findings regarding the existence of a "loan" as to the balance of the tax payments, the evidence is all in support of the recognition by Loew's of its tax liability on behalf of Mertens, for the correctly assessed taxes, and in refutation of any obligation on the part of Mertens to pay back the amount "loaned."

Mr. Levi [attorney for Loew's] told the Collector of Loew's contention that "Loew's was not required to pay Gravet's taxes *until after they had been finally determined for the full year 1938*" (italics supplied) [R. 155]; and that "they [Loew's] felt that *if it was incorrectly computed* that they had no obligation" (italics supplied) [R. 156]. Mr. White, accountant for Loew's, testified that Mr. Levi had told the revenue agent's office on or about August 25, 1938, that Loew's contended that they did not have to "reimburse him for this tax *until after the tax had become final*" (italics supplied) [R. 180-181]; and that he, Mr. White, had been informed that "Loew's would insist on regarding this as a loan *until the tax was finally determined.*" [Italics supplied, R. 182.]

The above statements reveal only what was in the minds of Loew's and its representatives, with respect to the tax liability. The Mertens were not available at the trial to testify in their own behalf; but when Mr. Mertens' testimony was presented through other witnesses, it clearly revealed that regardless of what the transaction might be

called, he understood that Loew's would be liable for his taxes, insofar as they arose out of his employment by Loew's. Mr. White testified [R. 182] that Mr. Gravet told him on September 7, 1938, that he [Gravet] "*had been told that this would not result in any financial detriment to him.*" (Italics supplied.) In other words, he [Gravet] did not expect ever to be held liable to repay these taxes so advanced by Loew's. In a letter on the following day, September 8, 1938, Mr. White's employers in reporting to Loew's concerning the above conversation pointed out that [R. 185-186]

The company's contention that its liability to pay income taxes of Mr. and Mrs. Mertens could not be determined until the close of 1938 was discussed with Mr. Mertens and he informed us that he understood the problem and was quite agreeable that the amounts advanced by the company for the payment of his and Mrs. Mertens' taxes should be considered as a loan *until the amounts of the taxes are finally determined.* (Italics supplied.)

Mr. Levi testified [R. 195-196] that at a studio conference with Mr. Gravet in the early part of September, 1938, he [Levi] "pointed to the provisions of the contract *which state that Loew's will pay taxes lawfully assessed* against him [Gravet] in the United States. I explained to him that it was the position of Loew's Incorporated that there was no liability on their part to make any payment to Mr. Gravet *until such a time as taxes had actually been lawfully assessed against him;*" that Levi had been authorized to lend Mr. Gravet sufficient money to satisfy the Collector's demand, and then they [Loew's] would "*let the question of the ultimate repayment of that loan hinge upon a final determination as to what his actual lawful tax*

liability was, once it was determined what taxes could or should have been lawfully assessed against him." (Italics supplied.) [R. 196.] In reply to this Mr. Mertens "finally did say, after considerable discussion * * * that it was satisfactory to him that the money that Loew's was to advance *should be regarded as a loan and that the ultimate liability would await determination of the final assessment.*" (Italics supplied.) [R. 207.]

In a letter to Mr. Gravet, dated September 8, 1938, after the alleged "new agreement," Loew's stated that [R. 210]:

*We realize, of course that ultimately we will be required as a part of our contractual liability to you to pay certain of your taxes as set forth in our agreements with you. * * ** As soon as the *exact amount of our liability to you under our agreements* can be determined we will credit your indebtedness with the amount of such liability. (Italics supplied)

The most definite expression of Mertens' understanding with respect to the whole transaction is contained in a letter signed by him, addressed to Loew's and dated September 13, 1938 [R. 308-311], a day or so before he sailed [R. 27], wherein, in answer to Loew's letter to him of September 8, 1938 [R. 209-210] he states the following [R. 308, 309]:

The tax payment of \$40,319.19 made by you represents additional compensation paid to me for my services in connection with the motion picture production, "The Great Waltz." *This money is not a loan and I will not be required to repay any refunds therefrom unless such refunds are actually received by me * * *.* Moreover, I might mention that I have consistently justified this position because we have always

regarded my operations as being under the original contract with Mervyn LeRoy, and any adjustments between the various studios would have to be worked out not by me but by the studios* * *.

According to Mr. Levi, this letter "should have been destroyed at that time" [R. 331], when, according to him [Levi] he had on the date of Mr. Mertens' departure allegedly secured his oral repudiation of it.

The only effect contemplated by the change in the form of the original agreement is apparent from a letter from Loew's accountants, Price-Waterhouse, to Loew's dated July 27, 1938 [R. 316], wherein it is stated that

it has been assumed that both Federal and California income taxes would be paid *during 1938*. If payment of the California income tax is delayed until 1939 there may be a saving of from \$500 to \$2,000 of such tax. Also, if all or part of the Federal income tax can be paid or *construed as having been paid in 1939*, there should be a substantial saving in both Federal and California income taxes. (Italics supplied.)

Mr. Mertens' attitude with respect to the payment of his taxes is also shown even in his consent to the assignment of the LeRoy contract to Loew's dated July 29, 1938 [R. 314], wherein he specifically provides that "nothing herein contained shall be construed to release Mervyn LeRoy from his obligations with respect to the payment of taxes under the provisions of * * * said contract of May 6, 1936." This is merely an additional confirmation of his attitude throughout that he should not be required to pay his taxes in the last analysis, no matter by what term the device was designated by which his taxes were paid for him. This position with respect to the original LeRoy

contract is consistent with his attitude as represented by the testimony of the witnesses at the trial with respect to the Loew's contract, as set forth above, to the effect that he was looking to his employers for the payment of his taxes pursuant to the various agreements entered into with the successive employers, insofar as they were correctly computed and lawfully assessed.

The very refund claims presented on behalf of the Mertens in September of 1940 [R. 90, 103] refer to the liability on the part of Loew's to pay Mertens' taxes, lawfully assessed, and merely question their inclusion as income prior to their definite and accurate computation. The evidence is clear that Mertens definitely understood that in all events his taxes were payable by his employers as correctly computed and lawfully assessed; that Loew's likewise definitely understood and agreed to this obligation, and at no time repudiated it; and that Loew's actually paid the full amount demanded by the Collector on behalf of both taxpayers in 1938, when the taxable period had been terminated by the Collector in accordance with the law applicable to such a situation.

The money advanced under the circumstances presented by this case, therefore, constituted income received by the Mertens in 1938, despite the possibility of a subsequent liability for the repayment of some part thereof. 2 Mertens, *Law of Federal Income Taxation*, Sec. 17.14; *Saunders v. Commissioner*, 101 F. (2d) 407 (C. C. A. 10th); *Brown v. Helvering*, 291 U. S. 193, 200; *North*

American Oil v. Burnet, 286 U. S. 417; *Commissioner v. Terre Haute Elec. Co.*, *supra*; *Commissioner v. Lyon*, 97 F. (2d) 70 (C. C. A. 9th); *Griffin v. Smith*, 101 F. (2d) 348 (C. C. A. 7th); *Heiner v. Mellon*, 304 U. S. 271, 275.¹⁰

The Mertens received the "economic benefit" of having this obligation discharged for them, and were thereby relieved of a liability which they would otherwise have had to discharge themselves. *Boston & Providence Railroad Corp. v. Commissioner*, 23 B. T. A. 1136; *United States v. Hendler*, 303 U. S. 564; *North American Oil v. Burnet*, *supra*; *Parkford v. Commissioner*, 133 F. (2d) 249 (C. C. A. 9th), certiorari denied, 319 U. S. 741; 2 Mertens, Law of Federal Income Taxation, Secs. 11.02, 17.20.

The fact that the transaction may have been carried on the books of the employer as a loan is immaterial, since there was no definite unconditional obligation binding the debtor to repay any amount. *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179; *Commissioner v. Union Pac. R. Co.*, 86 F. (2d) 637 (C. C. A. 2d); *Weise v. Commissioner*, 93 F.

¹⁰The courts go so far as to hold that even though money may have been advanced for taxes, for another, under a mistake of law that the payer was obligated to pay them, the contingent obligation to repay them will not prevent their inclusion as income in the first instance. See *Boston & Providence Railroad Corp. v. Commissioner*, 23 B.T.A. 1136, 1143-50; *United States v. Mahoning Coal R. R. Co.*, 51 F. 2d 208 (C.C.A. 6th).

Likewise, the fact that the taxpayer-creditor set up in its account books a statement that the funds received from the judgment debtor were subject to be returned in case the judgment should be reversed, and that the money was not to be used by the creditor pending the litigation was held not to change the status of the payment from that of income received in the first instance. *Commissioner v. Alamitos Land Co.*, 112 F. 2d 648 (C.C.A. 9th), certiorari denied, 311 U.S. 679.

(2d) 921 (C. C. A. 8th) cf. *Regensburg v. Commissioner*, 144 F. (2d) 41 (C. C. A. 2d); *Bankers Mortgage Co. v. Commissioner*, 1 T. C. 698, affirmed 141 F. (2d) 357 (C. C. A. 5th); *Gilman v. Commissioner*, 53 F. (2d) 47 (C. C. A. 8th); *City Nat. Bank Bldg. Co. v. Helvering*, 98 F. (2d) 216 (App. D. C.).

Additional alleged findings of the District Court regarding the "correct" amount of the tax, the "proper deductions" that should have been made, the "wrongful" inclusion of the tax paid by Loew's as part of the taxpayers' income, the finding that it was a "valid" loan, and similar expressions add nothing to the findings of fact, since these terms are mere conclusions of law. *Hoper v. Lennen & Mitchell*, 52 F. Supp. 319 (S. D. Cal.); *The Blairmore I*, 10 F. (2d) 35 (C. C. A. 2d); *Hamilton v. Scheets*, 6 F. Supp. 824 (N. D. Ill.). The very existence of a "loan" has been held to be a question of law (*Education Films Corp. v. International Film Serv. Co.*, 129 Misc. 370, 221 N. Y. S. 330, affirmed 222 App. Div. 668, 225 N. Y. S. 818; *Hoard v. Gilbert*, 205 Wis. 557, 238 N. W. 371; *Lobban v. Wierhauser*, 141 S. W. (2d) 384 (Tex. Civ. App.)) under the applicable test that a finding of fact is reached by mere natural reasoning from facts in evidence, whereas a conclusion of law results where the ultimate conclusion can be arrived at only by applying a rule of law to the facts (*Newport News Co. v. Schauffler, Va.*, 303 U. S. 54; *Tesch v. Industrial Comm.*, 200 Wis. 616, 229 N. W. 194; *Levins v. Rovegno*, 71 Cal. 273; *New v. Mutual Benefit H. & A. Ass'n*, 24 Cal. App. (2d) 681.) Tested by the above, the alleged finding regarding the total net income of taxpayers is likewise actually a conclusion of law, since it is based upon the legality of the inclusion or exclusion of certain items; so also, the matter of "proper deductions"

and the "correctness" of a tax. There are no actual findings of fact which support the conclusion of a loan, or of any error on the part of the Collector; and to the extent that these questions may be deemed mixed questions of law and fact, there is no substantial evidence to support such findings. Under these circumstances, the findings are reviewable as errors of law. *King v. Smith*, 110 F. 95, (C. C. A. 9th); *C. C. Mengel & Bro. Co. v. Handy Chocolate Co.*, 10 F. (2d) 293 (C. C. A. 1st) certiorari denied, 271 U. S. 668; *Mermis v. Waldo*, 91 F. (2d) 391 (C. C. A. 10th).

Further, the conclusions being based upon no true findings of fact with respect to a "loan," they are erroneous and will not support the judgment in favor of the taxpayers herein.

On the contrary, we have every element present which renders the payment in the instant case income received by taxpayers in 1938: A recognized obligation on the part of the employer to pay such taxes as were lawfully assessed against the employee, which obligation was never repudiated; an actual payment by the employer of the taxes assessed within the taxable period; taxes lawfully assessed under the law applicable to the peculiar circumstances arising in this case; and no promise of repayment whatsoever on the part of the employee except a possible contingent one to the extent of an overpayment of the taxes as subsequently determined. We submit that no other conclusion can legally be drawn from the facts and the evidence in the case than that the receipt of such payment constituted taxable income to the taxpayers herein in 1938.

Conclusion.

The conclusions of law and judgment of the District Court are erroneous, unsupported by the facts, and contrary to law and the controlling authorities. They should be set aside and vacated by this Court and judgment should be entered for appellant.

Respectfully submitted,

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April, 1945.

APPENDIX.

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Sec. 146. CLOSING BY COMMISSIONER OF TAXABLE YEAR.

(a) *Tax in Jeopardy.*—

(1) *Departure of taxpayer or removal of property from United States.*—If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer immediately

terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section the finding of the Commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design.

* * *

(b) *Security for Payment.*—A taxpayer who is not in default in making any return or paying income, war-profits, or excess-profits tax under any Act of Congress may furnish to the United States, under regulations to be prescribed by the Commissioner, with the approval of the Secretary, security approved by the Commissioner that he will duly make the return next thereafter required to be filed and pay the tax next thereafter required to be paid. The Commissioner may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this section, provided the taxpayer has paid in full all other

income, war-profits, or excess-profits taxes due from him under any Act of Congress.

(c) *Same—Exemption from Section.*—If security is approved and accepted pursuant to the provisions of this section and such further or other security with respect to the tax or taxes covered thereby is given as the Commissioner shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such respective taxes.

(d) *Citizens.*—In the case of a citizen of the United States or of a possession of the United States about to depart from the United States the Commissioner may, at his discretion, waive any or all of the requirements placed on the taxpayer by this section.

(e) *Departure of Alien.*—No alien shall depart from the United States unless he first procures from the collector or agent in charge a certificate that he has complied with all the obligations imposed upon him by the income, war-profits, and excess-profits tax laws.

(f) *Addition to Tax.*—If a taxpayer violates or attempts to violate this section there shall, in addition to all other penalties, be added as part of the tax 25 per centum of the total amount of the tax or deficiency in the tax, together with interest at the rate of 6 per centum per annum from the time the tax became due.

Civil Code of California:

Sec. 1912. Loan of money [defined]. A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed. A loan for mere use is governed by the chapter on loan for use. [Enacted 1872.]

No. 10933

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the Last
Will and Testament of Nat Rogan, Deceased,
Appellant,

vs.

FERNAND MERTENS, also known as Fernand Gravet, and
VICTORINE CATHERINE RENOURD MERTENS,
Appellees.

APPELLEES' REPLY BRIEF.

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APPELLEES' REPLY BRIEF.

Questions Presented.

Were the amounts advanced to appellee Fernand Mertens by his employer subsequent to the closing of appellees' taxable year includible in their income for the period prior to such closing?

Were the amounts so advanced to appellee Mertens by his employer so that he would have funds to pay a demand of the Collector of Internal Revenue which the employer considered unlawful a loan to the appellee?

Statement of Facts.

The pertinent facts are adequately and accurately set forth in appellant's brief. We believe it would serve no useful purpose to repeat them here.

ARGUMENT.

I.

The Action of the Collector of Internal Revenue in Demanding That Appellee Mertens Pay, as a Condition of Being Granted Permission to Leave the Country, a Tax Based Upon Amounts Which the Collector Thought Might Be Payable to Appellee at Some Time in the Future Was Arbitrary and Capricious.

When Mrs. Mertens applied to the Collector of Internal Revenue in June of 1938 for a certificate of compliance with the internal revenue laws, which she had to obtain in order to leave the country, she was required to pay a tax in the amount of \$3,245.92. In view of subsequent developments, it is significant to note that in computing this amount, the Collector considered only income already received. He made no effort to estimate or determine what her income might be for the remainder of the year and did not require the payment of tax on any such future income.

When, however, Mr. Mertens applied for a certificate of compliance in the latter part of August, 1938, the Collector not only demanded the payment of taxes on the income of Mertens and his wife which had already been received, but in addition demanded the payment of a much larger tax arrived at by including in the appellees' income the sum of \$40,017.41 which he thought might become payable to Mertens by his employer in the future. Apparently, the reason for the Collector thinking that certain additional sums might be payable was due to the fact that under a contract of employment between Mertens and Loew's Incorporated, Loew's agreed to pay Mertens a certain sum and, in addition, to pay "all taxes which may

lawfully be assessed" thereon. The amount of \$40,017.41 was apparently arrived at by a complicated mathematical formula, which has the following effect: First, the tax is computed upon the income actually received; the tax so computed is then added to the income and a new tax computation made; since the second computation obviously results in a larger tax than the first, the difference is then added to income and a third computation made; this process is repeated over and over until the additional amounts to be added become insignificant.

Apparently, the Collector in including in income, upon which his tax computations were based, amounts which he thought might become payable in the future did so on the grounds that such amounts were "constructively" received. This position is so specious as scarcely to warrant serious consideration. We appreciate fully that in many instances funds may be so available to a taxpayer or so subject to his control as to permit the conclusion that they constitute income in advance of their actual receipt. A common example is where interest is credited to a taxpayer's bank account. The interest is quite properly considered income to the taxpayer because it is available to him even though not actually withdrawn from the account. Again, where interest coupons mature, the taxpayer cannot avoid including the interest in income by the simple expedient of failing to detach the coupons and surrendering them for payment. Similarly, where compensation is clearly due and owing to an employee and the employer is both willing and able to pay, the compensation may be considered income even though the employee fails to take the necessary steps to obtain payment until a later date. In other words, where the situation is such that amounts owing to a taxpayer may be obtained simply

for the asking, they may be considered for tax purposes as though actually received.

We are not confronted with any such situation here. The obligation of Loew's Incorporated to pay appellee's taxes was limited to taxes "which may lawfully be assessed." [R. 25; Finding of Fact No. 11.] In other words, the employment agreement definitely contemplated that there should be a determination of appellee's taxes and a lawful assessment of the amount thereof as a condition of any liability on the part of Loew's to pay. The only thing in the nature of an assessment involved herein is the demand itself. Prior to such demand, appellees were in the same position as any other taxpayer reporting on the calendar year basis for the year 1938. Although one might make a tentative computation of their tax liability based on the assumption that the income already received would represent the total net income for the entire year and although one might conjecture or guess as to future income and losses and thereby arrive at an estimate of what the total liability might be, there was no certainty as to whether there would be a liability or the amount thereof. Thus, immediately prior to the demand, one of the essential elements of "constructive" receipt, *i. e.*, the existence of an obligation to pay, was totally lacking.

Appellant implies (App. Br. pp. 15 and 16) that the demand itself constituted an assessment which gave rise to the obligation on the part of Loew's to pay which, in turn, caused the amount of such obligation to be "constructively" received by appellees. This implication is suggestive of the old adage about lifting oneself by one's boot straps. Clearly, the demand *followed* rather than preceded the determination of appellees' income. Accordingly, for the demand to be lawful, the income upon which

based must have been realized actually or “constructively” *prior* to the time the demand was made. If such income was not realized prior to the demand, and we think we have clearly shown that it was not, then the demand was excessive and unlawful. The fact that appellees may have subsequently thereto received or “constructively” received income cannot cure it.

If there are any degrees of error, the action of the Collector was particularly erroneous in pyramiding taxes upon taxes. If the Collector had been content to demand a tax computed upon the income already realized, it might be reasonable to assume that in the normal course of events, Loew’s would have recognized an obligation to pay the amount thereof and would have paid such amount. The tax as so computed would have amounted to \$23,734.80. [R. 25; Finding of Fact No. 12.] There is, however, absolutely no basis whatsoever for assuming that Loew’s would have recognized an additional obligation to pay any taxes which appellees might have been required to pay on such amounts (*i. e.*, the taxes on \$23,734.80). Whether or not an obligation on the part of an employer to pay an employee’s taxes on his compensation carries with it an obligation also to pay any taxes employee may be required to pay on the amounts previously paid as taxes is an open question on which much may be said on both sides. We do not believe it necessary here to enter into a prolonged discussion of the pros and cons of this question. We think it is apparent that the Collector acted arbitrarily and capriciously in blithely assuming that the obligation to pay taxes on taxes so clearly existed as to warrant the conclusion that the amount thereof could be considered as already realized by appellees prior to the making of his demand.

Any possible lingering doubts as to whether the amounts in question were “constructively” received by appellees prior to the demand should be swept away when it is remembered that prior to the demand, the attorney for Loew’s, Mr. Leon Levi, had several conferences with the Collector concerning the amount of appellee’s liability. At at least one of such conferences, Mr. Levi informed the Collector in no uncertain terms that Loew’s would not recognize an obligation to pay any such amount contemplated by the Collector and subsequently demanded by him. [R. 197.] Thus, the Collector, at the time of his demand, had knowledge that the liability on the part of Loew’s would be disputed. In view of this, we think it is ridiculous and absurd to contend that the amount of the alleged obligation of Loew’s was as good as received, *i. e.*, “constructively” received by appellees at the time of the demand.

Although appellant has not as yet done so, appellant may possibly attempt to justify the action of the Collector on the grounds that where an alien is about to depart from the country, the Collector is not limited to demanding payment of a tax computed on income already realized, but may include in his computations income which he estimates may be realized during the remainder of the calendar year. Before discussing this matter, we wish to make it clear that the question is not whether the Collector’s estimate in the instant case was a reasonable one. With respect to that question, we might say, in passing, that we think it was reasonable to have anticipated that appellees would receive some additional income from Loew’s Incorporated. On the other hand, we think it was unreasonable to assume that they would receive the full amount which the Collector included. The question with which we are here concerned, however, is not whether

the estimate was reasonable, but whether the Collector was entitled to include estimated income in his computations or whether he was limited to income actually or “constructively” received at the time of making his demand.

Section 146 of the Internal Revenue Code, under which the Collector purportedly acted in the instant case, provides that where a taxpayer is about to depart from the United States, the “Commissioner shall declare the taxable period for such taxpayer *immediately* terminated and shall cause notice of such finding and declaration to be given the taxpayer together with a demand for immediate payment of the tax for the taxable period so declared terminated.” (Emphasis added.) There is some uncertainty as to the exact effect of the action of the Commissioner in terminating a taxpayer’s year pursuant to this section. One possibility is that the section means what it literally says and that when the year is terminated, it is terminated for all purposes, with the consequence that the calendar year which would otherwise be the taxable year is divided into two taxable periods—one covering the period from January 1 to the date of termination and the other from the date of termination to December 31.

There is some uncertainty in the instant case as to the exact date on which appellees’ taxable year was terminated. Presumably, it was September 1, the date specified in the returns which the Collector prepared for the appellees and caused them to sign. [R. 152: Ex. 8, p. 88a.] However, the exact date is immaterial as obviously it must have preceded the demand and also preceded the advance or loan of funds from Loew’s to the appellees. Since the income of one taxable period may not be included in another taxable period, it follows, of course, that if the taxable year terminated by the Collector was a separate

and distinct taxable period, he should have included therein, in computing the taxes therefor, only the income attributable to such period. Since, as shown above, the amounts which he estimated would subsequently be received by the appellees, were not received or "constructively" received prior to the close of the taxable year which was terminated by the Collector, it follows, of course, that such amounts should not have been included in computing the taxes due for such period.

Another possible construction of Section 146 is that, notwithstanding the literal provisions of the section, the action of the Collector in closing the taxable year only operates to close it tentatively and that the year still remains open so that the final tax liability therefor will be determined at the end of the year based upon the entire income and deductions therefor including the income and deductions after it was tentatively closed as well as the income and deductions prior to the tentative closing. This construction is suggested by the General Counsel for the Treasury Department in *General Counsel Memorandum 17195* (*Government Bulletin XV-44-8368*, November 2, 1936). See also *Ludwig Littauer & Co., Inc., v. Commissioner*, 37 B. T. A. 840.

But even if the action of the Collector does not actually close the taxable year but only closes it tentatively, we fail to see how this construction of this section authorizes or justifies the Collector in including for the period from the beginning of the year to the date of the tentative closing, income not attributable to that period, but which, if realized at all, is attributable to the remaining portion

of the year. To hold otherwise would result in giving absolutely no effect whatsoever to the provisions respecting the closing of the year. In effect, the section would be construed as if it provided that the Collector could, where a taxpayer is about to depart from the country, estimate the income for the entire taxable year and compute and demand the payment of a tax on such estimated amount.

We suggest that even under the tentative closing construction, the section should be construed as an authorization and direction to the Collector to proceed as *if the taxable year were closed*. In other words, even though the year is still open, for the purposes of finally computing the tax liability for the year, where a taxpayer is about to leave the country, the Collector may proceed at that time as if the year were closed and compute and demand the payment of a tax on the income already received up to that date. He is not, however, authorized to estimate, conjecture, or guess as to what the taxpayer's income might be for the remainder of the year and is not entitled to demand the payment of taxes on such estimated income. Thus, in the case of a taxpayer leaving in January, the Collector would not be justified in demanding the payment of a tax on income which he thinks the taxpayer might receive during the remaining eleven months of the year. Similarly, in the instant case, where the taxpayer gave notice of intention in August that he was about to depart from the country, the Collector was not authorized to demand the payment of taxes on income which might be received subsequently.

II.

There Is Ample Evidence to Support the Findings of the Trial Court That the Amounts Advanced by Appellee's Employer Constituted a Loan.

If the appellees' taxable year was actually closed for all purposes on September 1 or thereabouts, then, of course, it is immaterial whether the amount subsequently advanced by Loew's to provide appellees with funds to pay the amounts demanded by the Collector constituted a loan or constituted income to appellees. Even if such payment resulted in the receipt of income by appellees, the income was realized in a subsequent taxable period which is not involved in this proceeding. If, however, the closing on or about September 1 was only a tentative closing for the purpose of computing a tax on income previously realized with the consequence that the tax liability for the calendar year 1938 must be computed upon the entire income for the entire year, then it becomes necessary to consider whether the amount advanced to appellees in September constituted a loan or was income to them.

As pointed out above, the amount which the Collector demanded from appellees was arbitrary and excessive. In normal instances where taxpayers are faced with such a demand, they may protest the demand, request a conference and, if necessary, eventually file a petition with the Tax Court. Appellee Mertens, however, had no such alternative. He either had to post a bond to secure the payment of the excessive demand or obtain funds with which to pay it. If he had posted a bond and then at the close of the year 1938 filed returns reporting his actual income, there is no question that the liability for the year would have been only \$23,734.80 or less rather than \$40,017.41, which was demanded by the Collector. Simi-

larly, if the appellee had borrowed the necessary funds from a bank or from some other lending agency and had paid the Collector's demand and then subsequently instituted suit for refund, there is likewise no question that the correct liability would have been held to be \$23,734.80 or less. Under these circumstances, we see no reason why a different conclusion should be reached because Loew's happened to lend him the money with which to pay the demand.

Under the tentative closing theory, the demand itself was not an assessment. The actual assessment was not made until some months later. [R. 27; Finding of Fact No. 15.] Since the obligation of Loew's to pay Mertens' taxes was limited to taxes lawfully assessed, there was, accordingly, no obligation to pay Mertens any additional amount at the time of the advance and, consequently, such payment cannot be considered as discharging any obligation of Loew's to Mertens. But even if the demand is regarded as an assessment, it was plainly not a lawful assessment and, hence, it would still follow that there was no liability to pay Mertens any additional amounts at the time of the advance.

The court below found that the parties in treating the advance as a loan acted in good faith. [R. 28; Finding of Fact No. 16.] See also the lower court's Order for Judgment [R. 21] where the court states that "to treat such a loan as income would require us to disregard unchallenged facts and acts, the good faith of which has not been impugned by the government, and to substitute therefor highly speculative considerations." There is nothing whatsoever in the record to suggest that the idea of treating the advances as a loan was decided upon for the purpose of avoiding taxes. On the contrary, the record quite plainly suggests that the parties were forced

to this arrangement because of the arbitrary and unlawful action of the Collector in demanding payment of taxes upon income not yet realized and which might not be realized. To hold that, under these circumstances, the advance was not a loan but was income would, in effect, be to allow the government to profit by its own mistakes. We do not believe that such a result should be countenanced.

Conclusion.

The conclusions of law and judgment of the District Court are correct and fully supported by the facts. Accordingly, the judgment should be sustained.

Respectfully submitted,

MILTON H. SCHWARTZ,

FRANK M. KEESLING,

Attorneys for Appellees.

No. 10937

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the
Northern District of California, and FRANCIS
BIDDLE, Attorney General of the United
States,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,

Southern Division

FEB 15 1945

PAUL P. O'BRIEN,
CLERK



No. 10937

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the
Northern District of California, and FRANCIS
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

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Los Angeles, California.

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Messrs. FRANK J. HENNESSY,

United States Attorney,
Northern District of California.

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Assistant United Attorney,
Northern District of California.
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San Francisco, California.

Attorneys for Respondent and Appellee

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 23720 S Civil

In the Matter of the Petition of

JACK W. BAGLEY,

for a Writ of Habeas Corpus.

JACK W. BAGLEY,

Petitioner,

vs.

GEORGE VICE, United States Marshal for the
Northern District of California, and FRAN-
CIS BIDDLE, Attorney General of the United
States

Respondents.

PETITION FOR WRIT OF
HABEAS CORPUS

To the District Court of the United States, North-
ern District of California:

Comes now Jack W. Bagley, hereinafter referred
to as Petitioner, and files this petition for a writ
of habeas corpus on behalf of himself and respect-
fully represents:

1. The petitioner is a citizen of the United
States and a resident and citizen of the State of
California.

2. Petitioner is now in custody of and illegally
deprived of his liberty by respondents in San Fran-

cisco, California in the Northern District of California. The respondent Vice is the United States Marshal in said district and the respondent Biddle is the Attorney General of the United States to whose custody petitioner was committed. [1*]

3. The cause or pretense of such illegal imprisonment and restraint of petitioner is a judgment rendered and entered on September 29, 1943 in the District Court of the United States for the Northern District of California in a certain numbered cause on the Docket of said Court, No. 28056-R, whereby petitioner was convicted on verdict of guilty of the offense charged, to-wit: violation of Section 11 of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. Section 311, in that petitioner "did, on or about July 17, 1943, in Redwood City, California, having heretofore been classified in I-A and then and there knowingly and feloniously fail to comply with the order of his said local board No. 106 to report for induction into the Land or Naval forces of the United States" and thereupon was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years. No fine or costs were imposed upon petitioner in said judgment. Thereafter said judgment was affirmed by the Ninth Circuit Court of Appeals on June 14, 1944.

4. The judgment and commitment are void and the order of said Local Board in turn, was void

*Page numbering appearing at foot of page of original certified Transcript of Record.

because the petitioner was denied his due process of law and the Selective Service Agencies violated the Selective Service Regulations as will appear hereinafter in detail:

First. The Local Draft Board classified petitioner ~~without~~ considering the written evidence actually submitted by him.

Second. The Local Draft Board did not accord the petitioner the right to a personal appearance in that the petitioner was not given an opportunity to present his case supporting his claim for a classification as a conscientious Objector. [2]

Third. The petitioner was not accorded an opportunity to present his claim before the Hearing Officer and was not given an opportunity to meet, nor was he advised, of any adverse evidence against him; that the Hearing Officer refused to inform the petitioner as to the general nature and character of any evidence unfavorable to him; that the Hearing Officer misled the petitioner by advising him that there was no evidence against him after which the Hearing Officer based his adverse ruling upon evidence which he had notwithstanding his statement to the petitioner.

I.

Your petitioner duly registered under the Selective Training and Service Act of 1940, on February 15, 1943 with Local Board No. 106, in Redwood City, California. On August 14, 1942 petitioner filed his verified Selective Service Questionnaire, D.D.S. Form 40, with said Board. He declared

therein that by religious training and belief he was conscientiously opposed to war in any form and for that reason requested special form for Conscientious Objectors, Form 47. Thereafter, on August 27, 1942 petitioner filed with Local Board No. 106, D.D.S. Form 47, special form for conscientious objectors, claiming exemption from combatant and non-combatant Naval and Land Forces on the ground that he is a conscientious objector.

Despite ~~the~~ petitioner's claim to exemption from such service, on October 8, 1942, said Board classified petitioner I-A as available for general military or naval service. Petitioner wrote said Board requesting a personal appearance and advised the Board that he wanted to appeal from the I-A classification. On October 5, 1942 petitioner appeared [3] before the Board for what it termed (on its minutes) an "appeal", but was not given the opportunity, then or thereafter, to present any evidence to the Board. Said Board violated Selective Service Regulations Sec. 625.1 and Section 625.2 in that he was not given a personal hearing such as said regulations required.

Said Regulations are attached to this Petition, made part hereof by reference and marked Exhibit "A".

Thereafter, petitioner was advised that the said Appeal Board, on May 26, 1943, affirmed the said I-A classification of Petitioner and thereafter, on July 3, 1943, Local Board No. 106 sent petitioner an order to report for induction into the Land and Naval Forces of the United States on July 17, 1943.

On July 16, 1943 petitioner wrote and sent to said Board a letter protesting his I-A classification and again asking for a IV-E classification. Petitioner did not comply with the July 3rd order to report for induction, for the reason that his conscientious beliefs would not permit him so to do; and for the reason that said order was null and void.

II.

Petitioner alleges that his local draft board denied him due process of law, and violated the Regulations of the Selective Service System in that said board made a determination of his classification, classifying him I-A instead of his rightful IV-E, without considering the evidence submitted by him; said action of the Board being in violation of Selective Service Regulation 623.2. Said regulation provides that the Board must make a classification solely on the written information contained in the registrant's file.

The evidence submitted by him was his conscientious objector's questionnaire (D.D.S. No. 47) filed with the Board on August 27, 1942 as heretofore set forth and also a document labelled "Supplementary Information for Form No. 47." [4]

III.

The Notice to petitioner dated March 11, 1943, of the Hearing held on March 23, 1943 by the Officer of the Department of Justice advised petitioner (conforming to Department Instructions) that he had a right to present any pertinent evidence in

support of his claim and further advised him that at the hearing, upon his request, he would be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the prior investigation which was unfavorable to or tending to defeat his claim for exemption as a conscientious objector; and that he would be afforded an opportunity to explain or rebut such evidence. The aforementioned notice stated:

“4. At the hearing, the registrant, at his request will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence.”

However, the Hearing Officer's questions of the petitioner were few and perfunctory and when the Hearing Officer was asked if there was any evidence against the petitioner the Hearing Officer replied that there was none. Nonetheless, the Hearing Officer's files, at the time of the hearing (as the petitioner later learned) actually contained considerable evidence that reflected adversely on the patriotism and sincerity of the petitioner and contained as well reflections on his character by attacks on his school and work record and the petitioner was misled with respect thereto by the Hearing Officer. Petitioner did not know of the existence of the reports against him in the [5] possession of the Hear-

ing Officer until he made an appeal to the President by writing to General Lewis B. Hershey. Petitioner never had an opportunity to make his denials and explanations to the Hearing Officer.

Petitioner alleges said Hearing Officer violated the right of the petitioner to know the source of information adverse to the petitioner as required by due process of law and by the instructions of the Attorney General to Hearing Officers, as follows:

Department of Justices' Memorandum to Hearing Officers Appointed Pursuant to Sec. 5 (g) Selective Training and Service Act of 1940:

"A clear and succinct statement of the facts which will apprise the registrant of the objections raised to granting his ^{aim} ~~claim~~ is sufficient. However, no Hearing Officer should make any finding of facts detrimental to the registrant which is based upon information, the source of which is not disclosed to the registrant."

Petitioner alleges the report of the Hearing Officer is based on false evidence in the following particulars:

1. It states that petitioner was expelled from Sequoia Union High School.

That is not true. When visited by his mother the Dean of said High School advised that petitioner could return to school the next day.

2. It states that petitioner was only interested

in his own welfare and had only taken these steps for self-preservation. That is not true because petitioner had put every cent he could spare into "Mankind United", a religious organization, to promote peace, because of petitioner's belief in humanity.

3. It was stated that petitioner never expressed any religious inclinations or objections to war. That [6] is not true. Petitioner has always talked against war.

4. It states that one of the persons who signed his name as a reference on Form 47, did so under extreme pressure, with great misgivings. That is not true because this person signed willingly and has always taken a kindly interest in petitioner.

5. It was stated that because petitioner worked in a shipyard petitioner could not be conscientious. By working in a shipyard, petitioner was enabled to increase his support of "Mankind United."

On or about the 17th day of July, 1943 (the date he was to report for induction) the petitioner mistook the law and his rights and duties thereunder with respect to reporting for induction and understood, was of the belief, and had been advised that upon reporting to his local Draft Board as directed so to do by the order of induction, he thereby voluntarily surrendered to and became a part of the Armed Forces of the United States. The petitioner, as a conscientious objector, was unable to thus surrender to the United States Army and become a part thereof.

The petitioner did not discover until on or about May 15, 1944 that by reason of a Supreme Court

decision a registrant under the Selective Training and Service Act, ordered to report for induction does not become a member of the Armed Forces until and unless he takes the oath administered to the inductees.

The petitioner is willing at this time to comply with the order to report for induction heretofore issued by his local Draft Board, or any new order to report for induction which may be issued by his local Draft Board up to the point of actually becoming a member of the United States Army; and the petitioner is willing to take any other steps, up to said point of submission to said United States Army, so far as [7] are now known to the petitioner, which he may be ordered to take, short of and other than, such actual submission to said Army.

The petitioner is willing to take such steps in order to exhaust all administrative steps and procedures in order to secure a judicial review of the action of the Selective Service Agencies which said action the petitioner has claimed, and believes, to be in violation of his rights to due process of law, and in violation, by said Selective Service Agencies, of both the constitutional rights of petitioner and the Selective Training and Service Act and Regulations adopted pursuant thereto.

Had the petitioner, on or about July 17, 1943, known or been advised that reporting as directed by his local Draft Board, without taking the oath, would have continued civil, as distinguished from military jurisdiction over the petitioner, and had the petitioner known or been advised that such a

report on his part to the place directed in said order was necessary in order to secure a judicial review of the arbitrary action of the Selective Service Agencies, the petitioner would have so reported.

The petitioner is not held by virtue of any complaint, indictment, presentment, warrant, or quarantine law, rule, regulation, arrest or order, except as above specifically set forth. No application for a writ of habeas corpus has been made by or in behalf of said prisoner in regard to said restraint, or at all, except the petition herein.

Wherefore, your petitioner prays that an order be granted directing the respondents to have said Jack W. Bagley before said Court at a time and place therein to be specified, to do and receive what shall then and there be considered by said Court, concerning the petitioner so restrained, together with the time and cause of his detention, and said Writ; and that he may be restored to his liberty. And the [8] petitioner prays for such other relief as to the Court may seem just.

A. L. WIRIN and

J. B. TIETZ

Attorneys for Petitioner.

ORDER

Let a Writ of Habeas Corpus issue, returnable on The Petitioner may be released on bail, on the Writ, in the sum of \$.....

.....
United States District Judge.

[9]

EXHIBIT "A"

Selective Service Regulations, Sec. 625.2

"(a) At any such appearance the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as, he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(b) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification." [10]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN BEHALF
OF PETITION FOR A WRIT OF HABEAS
CORPUS

A Writ of Habeas Corpus will issue prior to induction, after conviction on a criminal charge to inquire into the denial of due process by Selective Service Agencies.

Bagley v. United States, Ninth CCA No. 10574,
decided June 14, 1944.

Respectfully submitted,

J. B. TIETZ

Attorney for Petitioner. [11]

State of California,
County of Los Angeles—ss.

Jack W. Bagley being by me first duly sworn, deposes and says: that he is the Petitioner in the above entitled action; that he has read the foregoing Petition and knows the contents thereof: and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JACK W. BAGLEY

Subscribed and sworn to before me this 25th day
of September, 1944.

EDWARD A. MITCHELL

City and County of San Fran-
cisco, State of California.

Received copy of the within Petition and Points and Authorities this 25th day of September, 1944.

FRANK J. HENNESSY

Attorney for Respondents.

[Endorsed]: Filed Sep. 25, 1944. [12]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein:

It Is Hereby Ordered that George Vice, United States Marshal for the Northern District of California, and Francis Biddle, Attorney General of the United States, or his representative, appear before this Court on the 3rd day of October, 1944, at the hour of 10 o'clock A. M., of said day, to show cause, if any they have, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Marshal for the Northern District of California and the Attorney General of the United States or his representative, the United States Attorney for this District, said copy of order to be mailed.

Dated: September 25, 1944.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Sep. 26, 1944. [13]

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR
WRIT OF HABEAS CORPUS

Comes now George Vice, United States Marshal for the Northern District of California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and moves the Honorable Court to dismiss the petition for writ of habeas corpus in the above-entitled case on the ground that the same is insufficient on its face to justify the issuance of a writ of habeas corpus or any other process.

Dated: September 30, 1944.

FRANK J. HENNESSY

United States Attorney,

JOSEPH KARESH

Asst. United States Attorney,
Attorneys for Respondent.

George Vice [14]

RESPONDENT'S MEMORANDUM IN SUP-
PORT OF MOTION TO DISMISS PETI-
TION FOR WRIT OF HABEAS CORPUS

The petitioner, convicted of violating the Selective Training and Service Act of 1940, 50 USCA Section 311, which conviction was affirmed by the Circuit Court of Appeals for the Ninth Circuit, seeks to have his Selective Service classification re-

viewed by means of a writ of habeas corpus while in the custody of the United States Marshal for the Northern District of California, into whose custody he has just surrendered himself.

This precise issue was considered adversely to the petitioners in the cases of

United States ex rel Falbo vs. Kennedy, and
United States ex rel Lohrberg vs. Nicholson,
CCA-4, 141 F. (2d) 689, certiorari denied by
the Supreme Court of the United States on
May 22, 1944.

In its decision the Court held that the petitioners were imprisoned "not under the Selective Service Act but under the judgment of a Court" and that the judgment could not be collaterally attacked by a resort to habeas corpus.

Relying upon the decision in the above-entitled cases, the respondent respectfully rests his argument, believing that these cases should prevail as against the dictum found in the case of Bagley vs. United States, cited by petitioner.

In denying certiorari the supreme Court of the United States seems to have agreed with the Fourth Circuit. The respondent respectfully requests this Honorable Court to likewise concur in the above decisions.

[Endorsed]: Filed Sep. 30, 1944. [15]

[Title of District Court and Cause.]

MEMORANDUM AND ORDER DISMISSING
PETITION FOR WRIT OF HABEAS CORPUS

Petitioner was convicted in this court (Case No. 28056-R) under an indictment charging violation of the Selective Service Act of 1940. Thereafter he was committed to the Attorney General of the United States for imprisonment for a term of two years. An appeal was taken and the judgment of this court was affirmed by the Circuit Court of Appeals for the Ninth Circuit on June 14, 1944 (No. 10574). Petitioner surrendered himself into the custody of the United States Marshal of this district under said judgment and commitment, and he now seeks a writ of habeas corpus, alleging that he is deprived of his liberty, upon the ground that he was denied due process of law by the local draft board when it refused his request for a personal appearance as provided by the Selective Service Regulations.

Respondents move to dismiss upon the ground that the petition on its face is insufficient to justify the issuance of the writ.

It appears from the record on appeal and the decision of the Circuit Court of Appeals, that the question as to petitioner's personal appearance and hearing before the local draft board was considered and determined. "It is clear that the judgment which was there upheld cannot be collaterally attacked on the same grounds by resort to habeas corpus." *U.S. v. Nicholson* and *U.S. v. Kennedy*, 141 F. (2d) 689. As was said in those cases petitioner

“is imprisoned, not under the Selective Service Act, but under the judgment of a court.” it is therefore [16]

Ordered, the petition for a writ of habeas corpus is dismissed and the order to show cause discharged.

Dated: October 3, 1944.

A. F. St. SURE

United States District Judge

[Endorsed]: Filed Oct. 3, 1944. [17]

District Court of the United States

Northern District of California

Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and forty-four.

Present: the Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

No. 23720-S Civil

This matter being submitted to the Court for consideration and decision, and the same now being fully considered, it is Ordered that the petition for a writ of habeas corpus be dismissed, and that the order to show cause be discharged in accordance with a memorandum and order this day signed and filed. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Frank J. Hennessy, United States Attorney, and
Joseph Karesh, Assistant United States At-
torney:

Notice Is Hereby Given, that the petitioner above
named, hereby appeals to the Ninth Circuit Court
of Appeals from the Order of October 3, 1944, deny-
ing the petition for Writ of Habeas Corpus and dis-
charging the Order To Show Cause.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ

Attorneys for Petitioner

[Endorsed]: Filed Nov. 8, 1944. [19]

[Title of District Court and Cause.]

APPLICATION FOR RELEASE ON BAIL
PENDING APPEAL

To the Honorable *J. F. T.* St. Sure, Judge of the
Above Entitled Court:

The petitioner, having heretofore filed his notice
of appeal, hereby applies for an order of Court re-
leasing him on bail pending the appeal.

A. L. WIRIN and J. B. TIETZ

By A. L. WIRIN

Attorneys for Petitioner

[Endorsed]: Filed Nov. 30, 1944. [20]

[Title of District Court and Cause.]

ORDER DENYING APPLICATION FOR RE-
LEASE ON BAIL PENDING APPEAL

Ordered:

Petitioner's application for an order of Court releasing him on bail pending the appeal of the above-entitled matter is denied.

Dated: November 30, 1944.

A. F. St. SURE

United States District Judge

[Endorsed]: Filed Nov. 30, 1944. [21]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court Above Named:

You will please prepare, pursuant to Rule 75, Federal Rules of Civil Procedure and particularly Rule 75(j), a transcript of the following, and cause the same to be delivered directly to the Clerk of the Circuit Court of Appeals for the Ninth Circuit:

1. Petition for Writ of Habeas Corpus
2. Motion to Dismiss Petition for Writ of Habeas Corpus
3. Order to Show Cause
4. Motion for Order Dismissing Petition for Writ of Habeas Corpus
5. Application for release on bail, pending appeal

6. Order of the Court upon said application
7. Affidavit of Service, if any, upon respondents
8. All Minute Orders of the Court
9. Notice of Appeal.

A. L. WIRIN and J. B. TIETZ

By A. L. WIRIN

Attorneys for Petitioner and
Appellant

[Endorsed]: Filed Nov. 30, 1944. [22]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 22 pages, numbered from 1 to 22, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Jack W. Bagley, Petitioner, vs. George Vice, United States Marshal for the Northern District of California, and Francis Biddle, Attorney General of the United States Respondents, No. 23720 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.50 and that the said sum has been paid to me by the Attorney for the appellant herein.

personal appearance before his local draft board, when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.

4. The District Court erred in holding it could not consider whether or not a petitioner for a Writ of Habeas Corpus had been accorded an opportunity to present his claim to a certain classification before the Hearing Officer; and the District Court erred in holding it could not consider whether or not he had been given an opportunity to meet adverse evidence nor whether or not the Hearing Officer misled him by advising him there was no adverse evidence against him, when petitioner had previously been convicted on a Selective Service Charge and said conviction had been affirmed by the Circuit Court of Appeals.

Dated January 18, 1945.

A. L. WIRIN and J. B. TIETZ

By J. B. TIETZ

Attorneys for Appellant

(Affidavit of service by mail attached.)

[Endorsed]: Filed January 30, 1945. Paul P. O'Brien, Clerk.

No. 10937

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern
District of California, and FRANCIS BIDDLE, Attorney
General of the United States,

Appellees.

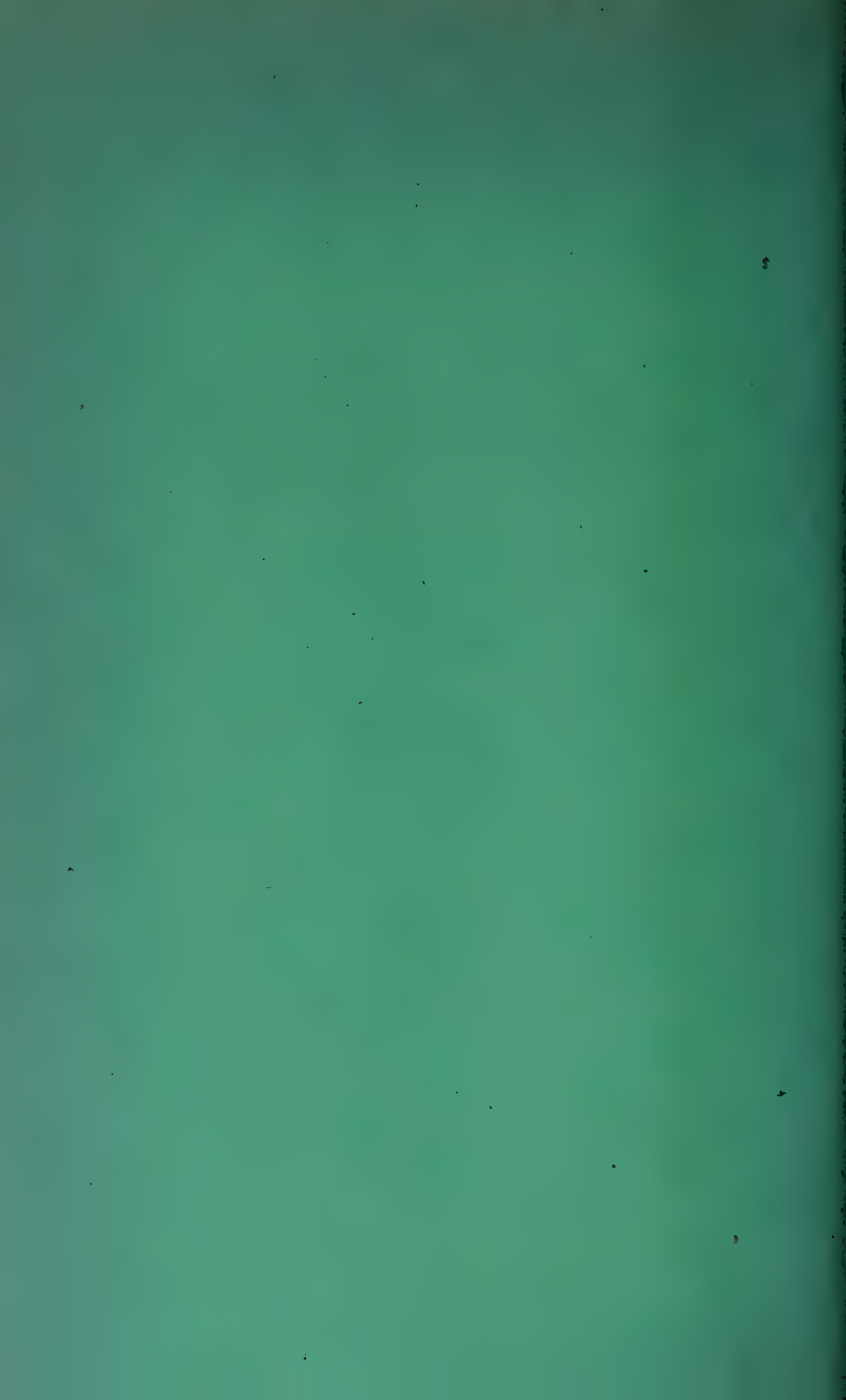
APPELLANT'S OPENING BRIEF.

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FILED

MAR 12 1945

PAUL B. O'BRIEN



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No. 10937

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern
District of California, and FRANCIS BIDDLE, Attorney
General of the United States,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the District Court for the Northern District of California, Southern Division, denying the appellant's petition for a writ of habeas corpus.

This court has jurisdiction under provisions of 28 United States Code, Section 225(a).

Statement of Case.

Appellant is a conscientious objector. He believes he was denied due process of law by the Selective Service System and he therefore refused to report for induction. He was indicted, convicted, sentenced, and his appeal was affirmed in *Bagley v. United States*, 144 Fed. (2d) 788, wherein the court stated:

“ . . . Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error the writ of habeas corpus has of late years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the ‘due process’ question by resort to this remedial writ.”

Appellant thereafter surrendered to the Marshal and filed a petition for a writ of habeas corpus in the District Court below. It was submitted with Points and Authorities and on October 3rd, 1944, the District Court filed a Memorandum and Order Dismissing the Petition. [R. 17.]

Question.

Did the District Court violate the implied mandate of this court in *Bagley v. United States* by ruling that a writ of habeas corpus was not available to the appellant?

Specification of Assigned Errors Relied Upon.

1. The District Court erred in dismissing petition for writ of habeas corpus.
2. The District Court erred in holding it could not consider the question of whether a petitioner for a writ of habeas corpus had been denied due process when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.
3. The District Court erred in holding that it could not consider whether or not a petitioner for a writ of habeas corpus had been deprived of a personal appearance before his local draft board, when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.
4. The District Court erred in holding it could not consider whether or not a petitioner for a writ of habeas corpus had been accorded an opportunity to present his claim to a certain classification before the Hearing officer; and the District Court erred in holding it could not consider whether or not he had been given an opportunity to meet adverse evidence nor whether or not the Hearing Officer misled him by advising him there was no adverse evidence against him, when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.

ARGUMENT.

A Writ Will Issue Upon Allegation and Proof That a Selective Service Registrant Has Been Denied Due Process, the Registrant Thereafter Having Been Convicted and Being Presently Imprisoned; nor Is There Less Reason for the Issuance of the Writ Because the Registrant Had First Been Denied, in the District Court, the Opportunity to Present Such a Defense and Latterly in the Circuit Court of Appeals.

A.

A Denial of Due Process Exists When the Fundamental Rights of a Selective Service Registrant Have Been Abridged; and a Writ Will Issue.

This point is made merely as a preliminary to further discussion for, in its above stated bare form, it should need no argument. Although the scope of judicial review is not altogether settled in selective service cases as in administrative proceedings generally, it is submitted that the remedy of habeas corpus is available upon allegation and proof that a denial of due process exists. True, a petitioner's case may be complicated, indeed even defeated by his failure to make timely and consistent protest or by his failure to proceed further than the spot chosen by him to make his stand and thereafter seek judicial review. This will be commented on more fully hereafter under subsection "C."

See

United States v. Grieme, 128 F. (2d) 811 (C. C. A. 3, 1942);

In re Greenberg, 39 Fed. Supp. 13 (D. C., N. J., 1941).

The denial to petitioner of his rights in the Selective Service process consisted of three items [R. 4]:

First. The Local Draft Board classified petitioner without considering the written evidence actually submitted by him.

Second. The Local Draft Board did not accord the petitioner the right to a personal appearance in that the petitioner was not given an opportunity to present his case supporting his claim for a classification as a conscientious objector.

Third. The petitioner was not accorded an opportunity to present his claim before the Hearing Officer and was not given an opportunity to meet, nor was he advised, of any adverse evidence against him; that the Hearing Officer misled the petitioner by advising him that there was no evidence against him after which the Hearing Officer based his adverse ruling upon evidence which he had notwithstanding his statement to the petitioner.

B.

The District Court May Consider a Petition for a Writ of Habeas Corpus on Grounds That Attack the Basis of Detention, After Conviction, and a Writ Will Lie on Such Grounds.

The Supreme Court has spoken on this point in instances where the trial court's *jurisdiction* is questioned by the petitioner. In the case of *Johnson v. Zerbst*, 304 U. S. 468, 470, we find:

“The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas

corpus is addressed—should be alert to examine ‘the facts for himself when if true as alleged they make the trial absolutely void.’ ”

Whether an allegation of denial of due process presents an equally or a sufficiently strong case may be open to argument but the dissenting opinion of Mr. Justice Holmes in *Frank v. Magnum*, 237 U. S. 309, 346, so arguing, has often been approved since its statement in 1915. It is not suggested that the facts of the case at bar are directly comparable with those of the aggravated *Frank* case that led Mr. Justice Holmes to remark: “Mob law does not become due process of law by securing the assent of a terrorized jury.” (P. 347.) We do submit that the principle enunciated is applicable to the case at bar and that since 1915 the Congress and the Supreme Court have so liberalized habeas corpus that your petitioner is embraced in its protection.

In the case of *Walker v. Johnston*, 312 U. S. 284, 285, we find:

“As we said in *Johnson v. Zerbst*, 304 U. S. 458, 466, 82 L. ed. 1461, 1467, 58 S. Ct. 1019, ‘Congress has expanded the rights of a petitioner for habeas corpus. . . . There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus . . . it results that under the sections cited a prisoner in custody . . . may have a judicial inquiry into the very truth and substance of the causes of his detention. . . .’ Such a judicial inquiry involves the reception of testimony, as the language of the statute shows.”

The protective power of habeas corpus when urged by a petitioner after his conviction on a criminal charge has

been exercised in Selective Service situations and should be exercised in the instant case.

In *Ver Mehren v. Sirmeyer*, 36 F. (2d) 876 (C. C. A. 8, 1924), it was held that the petitioner was entitled to a discharge under courtmartial proceedings where it appeared that he had not been legally inducted and that the Selective Service Regulations under the Selective Service Act of 1917 had not been followed. See, also, *Ex parte Milligan*, 4 Wall. 2. In the *Ver Mehren* case, *supra*, the court thus went behind the courtmartial back to the Board, and having found that the Board had *improperly inducted* him, wiped out the courtmartial conviction entirely. In other words, after the petitioner had actually been convicted by courtmartial, the court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance.

The principle involved in the *Ver Mehren* case, denial of due process, is not to be confused with the current "forcible induction" cases¹ through a similarity of origin that is more apparent than real. (The 1917 draft laws provided that a registrant was "inducted" when his local board ordered him to report. The 1940 draft law, as construed by the Supreme Court in *Billings v. Truesdell*, 321 U. S. 542, provides that a man is not inducted until he takes the oath or, as some later cases² have pointed out, affirmatively adopts or acquiesces in a military status for himself.)

¹*Ex parte Yost*, 55 Fed. Supp. 768; *In re Herman*, 56 Fed. Supp. 733.

²*Miller v. Commanding Officer*, 57 Fed. Supp. 884; *United States v. Graham*, 57 Fed. Supp. 941.

C.

Petitioner's Original Failure to Complete His Administrative Remedies Does Not Bar Him From the Benefits of a Writ of Habeas Corpus.

It is conceded that the import of the *Falbo* and *Billings*³ cases is that exhaustion of administrative remedies, for a Selective Service registrant, required him to proceed at least one step further than the place the petitioner chose to test his grievances. It is submitted, however, that this defect in his case is cured by his current willingness to take the necessary additional step (as it is set forth in his petition) coupled with the law on the subject and particularly by this court's opinion in the case of *Bagley v. United States (supra)*.

In his petition for a writ of habeas corpus the petitioner says:

"On or about the 17th day of July, 1943 (the date he was to report for induction), the petitioner mistook the law and his rights and duties thereunder with respect to reporting for induction and understood, was of the belief, and had been advised that upon reporting to his local draft board as directed so to do by the order of induction, he thereby voluntarily surrendered to and became a part of the Armed Forces of the United States. The petitioner, as a conscientious objector, was unable to thus surrender to the United States Army and become a part thereof.

"The petitioner did not discover until on or about May 15, 1944, that by reason of a Supreme Court decision a registrant under the Selective Training

³*Falbo v. United States*, 320 U. S. 549, 64 S. Ct. 346; *Billings v. Truesdell*, 321 U. S. 542, 64 S. Ct. 737.

and Service Act, ordered to report for induction, does not become a member of the Armed Forces until and unless he takes the oath administered to the inductees.

"The petitioner is willing at this time to comply with the order to report for induction heretofore issued by his local draft board, or any new order to report for induction which may be issued by his local draft board up to the point of actually becoming a member of the United States Army; and the petitioner is willing to take any other steps, up to said point of submission to said United States Army, so far as are now known to the petitioner, which he may be ordered to take, short of and other than such actual submission to said Army.

"The petitioner is willing to take such steps in order to exhaust all administrative steps and procedures in order to secure a judicial review of the action of the Selective Service Agencies which said action the petitioner has claimed, and believes, to be in violation of his rights to due process of law, and in violation, by said Selective Service Agencies, of both the constitutional rights of petitioner and the Selective Training and Service Act and the Regulations adopted pursuant thereto.

"Had the petitioner, on or about July 17, 1943, known or been advised that reporting as directed by his local draft board, without taking the oath, would have continued civil, as distinguished from military jurisdiction over the petitioner, and had the petitioner known or been advised that such a report on his part to the place directed in said order was necessary in order to secure a judicial review of the arbitrary action of the Selective Service Agencies, the petitioner would have so reported."

It is submitted that this court (having before it the above offer) indicated to petitioner his remedy when this court in its opinion⁴ in the *Bagley* case stated (at p. 791):

“ . . . Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error the writ of habeas corpus has of late years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the ‘due process’ question by resort to this remedial writ.”⁵

it undoubtedly had reference to the large and growing number of Supreme Court decisions broadening the scope of the writ of habeas corpus.

The court must have had reference to the *Johnson* case (*supra*) at page 465, in which the Supreme Court stated that:

“The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since adoption of the Sixth Amendment.”

Other recent Supreme Court cases are:

Holiday v. Johnson, 313 U. S. 342; here the court stated that (at p. 350):

“ . . . a petition for habeas corpus ought not to be scrutinized with technical nicety;”

⁴Apparently ignored or misread by the District Court judge, A. F. St. Sure, below. [R. 17.]

⁵It is to be noted that appellant's petition faithfully followed this opinion.

and further (at p. 351):

"We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of habeas corpus in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done."

Chief Justice Hughes in *Bowen v. Johnston*, 306 U. S. 19, 26, reminded the courts of the nation that:

"It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

Further it must be remembered that:

"... habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." (Justice Holmes, dissenting in *Frank v. Magnum* (*supra*).)

In even more recent decisions these same views are reaffirmed.

See

Pyle v. Kansas, 317 U. S. 213;

United States v. Adams, 320 U. S. 220.

Similarly, in *Smith v. O'Grady*, 312 U. S. 329, 332, Justice Black referred to the writ as the great "historic remedy." This was an echo of the views of the court in *Mooney v. Holohan*, 294 U. S. 103, 113, that the writ was the

" . . . historic remedial process when it appears that one is deprived of his liberty without due process of the law in violation of the Constitution of the United States."

More particularly and specifically, however, in *Enge v. Clark*, 144 F. (2d) 638 (see footnote of opinion at p. 638), this court recognized the availability of the writ of habeas corpus because of the pendency of similar cases, and deemed the latter "an exceptional circumstance" referred to in *Jones v. Perkins*, 245 U. S. 390, and *Jones v. Hoy*, 227 U. S. 245.

It is to be noted that the court below, in the instant case, did not even follow the ruling of this court in the *Enge* case and did not issue the writ and hear the case on the merits, as did this court in *Enge v. Clark*, 144 F. (2d) 638. The District Court below summarily denied the petition without ordering a writ issued and without hearing the petitioner's claim for relief on its merits.

Conclusion.

The District Court erred in deciding that the conviction and the affirmance of the conviction precluded the petitioner from obtaining a writ of habeas corpus on the ground urged for issuance of the writ, denial of due process, which had been offered as a defense in criminal proceedings and denied in such proceedings.

A petitioner imprisoned by reason of a Selective Service violation is entitled to a writ of habeas corpus upon allegation and proof of violation of his fundamental rights in the Selective Service process.

Respectfully submitted,

A. L. WIRIN and J. B. TIETZ,

By J. B. TIETZ,

Attorneys for Appellant.

No. 10,937

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JACK W. BAGLEY,

Appellant,

VS.

GEORGE VICE, United States Marshal for the
Northern District of California, and
FRANCIS BIDDLE, Attorney General of the
United States,

Appellees.

BRIEF FOR APPELLEE, GEORGE VICE.

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No. 10,937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the
Northern District of California, and
FRANCIS BIDDLE, Attorney General of the
United States,

Appellees.

BRIEF FOR APPELLEE, GEORGE VICE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California dismissing appellant's petition for writ of habeas corpus (Tr. p. 17). The District Court had jurisdiction of the habeas corpus proceeding under Title 28 U.S.C.A., Sections 451, 452 and 453. Jurisdiction to review the District Court's order dismissing the petition is conferred upon this Court by Title 28, U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

Appellant is an alleged conscientious objector, although both his Local Board and the Appeal Board unanimously decided that he was not entitled to classification as such and found him available for general military service. He was duly ordered to report for induction, refused to report, was indicted in the United States District Court for the Northern District of California for violation of the Selective Training and Service Act of 1940, 50 U.S.C.A., Section 311, tried by a jury and convicted. He appealed on the ground that the Draft Board and the Appeal Board had denied him due process in classifying him and had his conviction affirmed in

Bagley v. United States, 144 F. (2d) 788.

Appellant thereafter surrendered to the United States Marshal for the Northern District of California, the appellee herein, and filed a petition for a writ of habeas corpus in the Court below urging in substance the same arguments as he had raised in the appeal from his conviction. The appellant then moved to dismiss the petition on the ground that the same was insufficient on its face to justify the issuance of a writ of habeas corpus (Tr. p. 15), and the Court, after consideration of the pleadings, filed a memorandum and order dismissing the petition (Tr. p. 17). From this order the appellant now appeals (Tr. p. 19).

QUESTION.

Is the writ of habeas corpus available to a prisoner convicted of violating the Selective Service Act on the ground that his Draft Board and the Appeal Board acted improperly in classifying him?

ARGUMENT.

The appellant in his opening brief declares the issue involved herein to be as follows: "Did the District Court violate the implied mandate of this Court in *Bagley v. United States*, supra, by ruling that the writ of habeas corpus was not available to the appellant?"

In his Statement of the Case appellant refers to the following dictum of this Honorable Court as an "implied mandate":

"* * * Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error the writ of habeas corpus has of late years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the 'due process' question by resort to this remedial writ."

(Appellant's Brief, p. 2, lines 7 through 15.)

If we accept as correct what appellant states to be the issue in this case, then we would be disregarding the fundamental rule of criminal law involved. The present custody of the appellant can only be invalid

if his conviction or sentence is invalid. The same matters that would not invalidate his conviction can not invalidate his imprisonment under that conviction. In the dictum above referred to this Honorable Court said that Bagley "may test the 'due process' question by resort to this remedial writ". It must be apparent that this Court referred to a denial of due process in the conviction but not to a denial of due process in the Selective Service classification.

The controlling cases supporting appellee's contention that the writ of habeas corpus is not available to the appellant herein are:

United States ex rel. Falbo v. Kennedy and
United States ex rel. Lohrberg v. Nicholson
 (CCA-4), 141 Fed. (2d) 689, cert. denied 322
 U. S. 744, 745;

United States ex rel. Arpaia v. Alexander
 (CCA-2), decided January 22, 1945, Fed.
 (2d)

The appellant cites none of these cases in his brief and the failure on his part can be well understood in view of the fact that the issue involved in these cases is identical with the issue involved in the case at bar, decided adversely to the appellants.

See also:

Albert ex rel. Ravin v. Gougen (CCA-1), 141
 Fed. (2d) 302;

Ex parte Catanzaro (CCA-3), 138 F. (2d) 100,
 cert. denied 321 U. S. 793;

United States ex rel. Catanzaro v. Hiatt (M.D.
 Pa.), 55 Fed. Supp. 86;

United States ex rel. Schafer v. Bezona (E.D. Wash.), 54 Fed. Supp. 1019;

United States ex rel. Hoce v. McGinnis (CCA-4), decided December 6, 1944, Fed. (2d)

.....

On page 4 of his brief appellant says:

“* * * the remedy of habeas corpus is available upon allegation and proof that a denial of due process exists.”

The appellant confuses the issue when he speaks in this wise. An inductee in the armed forces may test the validity of his induction and he may use habeas corpus as an appropriate means of doing so; however, as we have already stated, the appellant is imprisoned by virtue of his conviction. All that he may test, therefore, is the validity of that conviction.

The appellant relies on the cases of *Johnston v. Zerbst*, 304 U. S. 458, and *Walker v. Johnston*, 312 U. S. 275, but in these cases the conviction was attacked. Here the appellant is not attacking his conviction, which is admittedly valid, and has been affirmed on appeal.

The appellant cites *Ver Mehren v. Sirmyer*, 36 F. (2d) 876. Here the question was whether or not the registrant had ever been inducted and therefore subject to military jurisdiction. The case involved failure to send notices necessary for the automatic induction under the Selective Service Act of 1917. Since these notices were not properly sent the registrant was not

automatically inducted and could not be held as a deserter.

An analysis of the other cases cited by appellant in his brief likewise indicates that they are not in point. All, therefore, that remains to give the appellant any shred of comfort is the dictum of this Honorable Court in the *Bagley* case, *supra*, but as we pointed out, we believe this Court spoke of the denial of due process in the conviction and not of due process in the denial of Selective Service classification. In view of the Supreme Court's denial of certiorari in the *Falbo* case, cited *supra*, we believe that no other conclusion can be reached than this.

CONCLUSION.

It is therefore respectfully urged that the order of the Court below dismissing the petition for writ of habeas corpus was correct and should be affirmed. To decide otherwise is to open a field of litigation never contemplated by habeas corpus and thus weaken its effectiveness.

Dated, San Francisco,

April 26, 1945.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee,

*George Vice, United States Marshal for
the Northern District of California.*

No. 10937

IN THE
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FOR THE NINTH CIRCUIT

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Appellees.

APPELLANT'S REPLY BRIEF.

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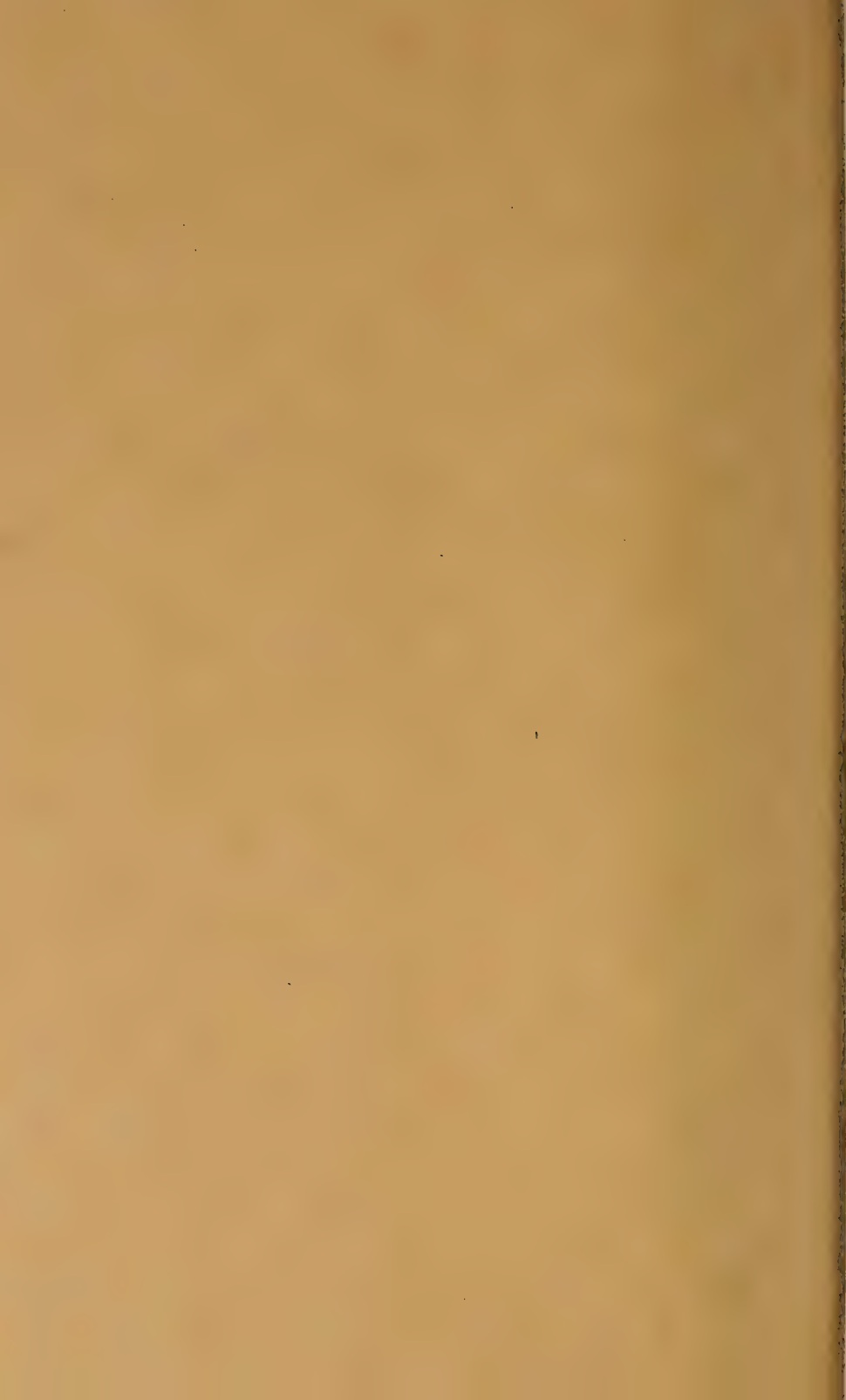
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No. 10937

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for
the Northern District of California, and
FRANCIS BIDDLE, Attorney General of the
United States,

Appellees.

APPELLANT'S REPLY BRIEF.

**The Appellant Is Entitled to a Writ of Habeas Corpus
on the Ground of Absence of Jurisdiction in the
Trial Court Due to a Failure of Due Process in
the Selective Service Procedure.**

The brief of appellee endeavors to summarily dismiss
the following statement of the Court¹:

“ . . . Appellant has not as yet been inducted,
and it is quite possible even after affirmance of the
conviction that he has adequate means of testing
whether or not he has been accorded due process.
Although it cannot be used to the full extent of the
writ of error the writ of *habeas corpus* has of late

¹*Bagley v. United States*, 144 Fed. (2d) 788.

years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the 'due process' question by resort to this remedial writ."

Appellee casually remarks:

"It must be apparent that this Court referred to a denial of due process in the conviction but not to a denial of due process in the Selective Service classification." (Appellee's Brief, p. 4.)

Obviously, this Honorable Court was not hinting that it, for unstated (and unimaginable) reasons was overlooking a denial of "due process" in the conviction: Since *habeas corpus* cannot take the place of a writ of error, nor of a writ of certiorari the Court's reference to testing the "due process" question by resorting to this remedial writ could refer only to "due process" in the administrative procedure preceding the indictment.

Appellee states (Appellee's Brief, p. 4):

"The controlling cases supporting appellee's contention that the writ of *habeas corpus* is not available to the appellant herein are:

"*United States ex rel. Falbo v. Kennedy* and *United States ex rel. Lohrberg v. Nicholson* (CCA-4), 141 Fed (2d) 689, cert. denied 322 U. S. 744, 745; *United States ex rel. Arpaia v. Alexander* (CCA-2), decided January 22, 1945, Fed. (2d)"

The facts in the *Falbo v. United States* and in *Falbo v. Kennedy* cases were one and the same, and the grounds advanced for judicial relief were also identical, namely, misclassification by the Selective Service System.

By reason of the Supreme Court's decision in the former case, a second, identical attack on the propriety of the

classification, through a petition for a writ of *habeas corpus*, necessarily failed in the latter case.

Bagley, in the case at bar, does not attack the *propriety* of his classification, but does attack the *jurisdiction* of the Selective Service agencies and of the Court on the ground of failure of "due process."

The other cases referred to by appellees' brief, on pp. 4 and 5 are likewise distinguishable: In none but the *Schafer* case had the petitioner qualified for a judicial review, either by exhausting his administrative remedies or by offering to so exhaust them for the purpose of testing his rights. The *Schafer* case, however, is distinguishable on other points, as will be hereinafter set forth.

In none of the cases cited was there so serious a deprivation of rights as Bagley suffered: namely, that his Hearing Officer had completely misled him. [Tr. 7.]

Reviewed seriatim, appellee's cases are:

Ravin v. Cougen, (CCA-1), 141 Fed. (2d) 302; here the petition for a writ of *habeas corpus* was directed against the Marshal *before* trial. This situation is, of course, identical with our Ninth Circuit case of *Enge v. Clark*, 144 Fed. (2d) 638.

Ex Parte Catanzaro, (CCA-3), 138 Fed. (2d) 100, cert. denied 321 U. S. 793. This case merely held that the petitioner *had not qualified himself* for a judicial review. "To grant it to him at the point he has chosen would not, we believe, conform to the will of Congress." [p. 102.]

At this point it should be noted that Bagley, petitioner in the case at bar, has qualified himself for judicial review (so we submit), as our Opening Brief details on pp. 8, 9 and 10.

Noteworthy in this *Catanzaro* decision is the dissenting opinion of Circuit Judge Biggs, where it is pointed out:

1. Nowhere in the Act is it provided that everyone must obey any order of a draft board.

2. Categories of exempted registrants are set up by the Act.

3. If a registrant within one of these exempted categories is denied a fair hearing, or if his local board acts capriciously or arbitrarily or contrary to law in determining his status, the registrant (having exercised his administrative remedies to the full) is entitled to the benefits of the writ, if he is arrested for failure to obey the void order requiring him to report for induction.²

Catanzaro v. Hiatt, 55 Fed. Supp. 86. This case flatly states there is no right to a judicial review of the action of a Selective Service Board. However, this ruling must be considered in the light of the facts, namely, that the petitioner *had failed to report for induction*, and was therefore not qualified to ask for a judicial review.

Schafer v. Bezona, 54 Fed. Supp. 1019. The facts of this case most nearly approach those of the instant case, but they are distinguishable. First, the *Schafer* case was

²Judge Biggs went on to say: "In a *habeas corpus* proceeding the court ought to look through the legalistic distinction which the majority would draw between the registrant's violation of the Act because of failure to obey the order and his violation of the order itself. The vital and fundamental thing is that the registrant has been deprived of his liberty because and only because of his refusal to obey an order which was wholly void since it was made without due process of law. Under such circumstances the name or nature of the agency or of the officer of the United States who holds him in custody is immaterial."

decided before this Court's rendition of the *Bagley v. United States* (*supra*) opinion and the trial court did not have the benefit of this Court's considered opinion; additionally, the trial court expressly referred to the possibility of a higher court passing on the problem posed. [p. 1022.]

"If it is to be the law that erroneous advice by trained and experienced counsel is to be construed as a deprivation of an accused's day in court, it is essential that the initial statement of that rule shall emanate from a higher tribunal than this."

The facts also present a material difference in that *Schafer* violated an order to report to a C. P. S. Camp (conscientious objector's camp) whereas *Bagley* desires just such an order; the *Schafer* case did not present the problem of an objector who is conscientiously unable to submit to Army authority. Finally, the case at bar is not one, like the *Schafer* case, of an objector attacking a local board's *classification*; failure of 'due process' is the critical distinction between them.

Conclusion.

The Order Dismissing the Petition for a Writ of *Habeas Corpus* should be reversed to permit the petitioner a means of testing whether or not he has been accorded due process.

Respectfully submitted,

A. L. WIRIN and
J. B. TIETZ,

By J. B. TIETZ,

Attorneys for Appellant.

No. 10937

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern
District of California, and FRANCIS BIDDLE, Attorney
General of the United States,

Appellees.

PETITION FOR REHEARING.

FILED

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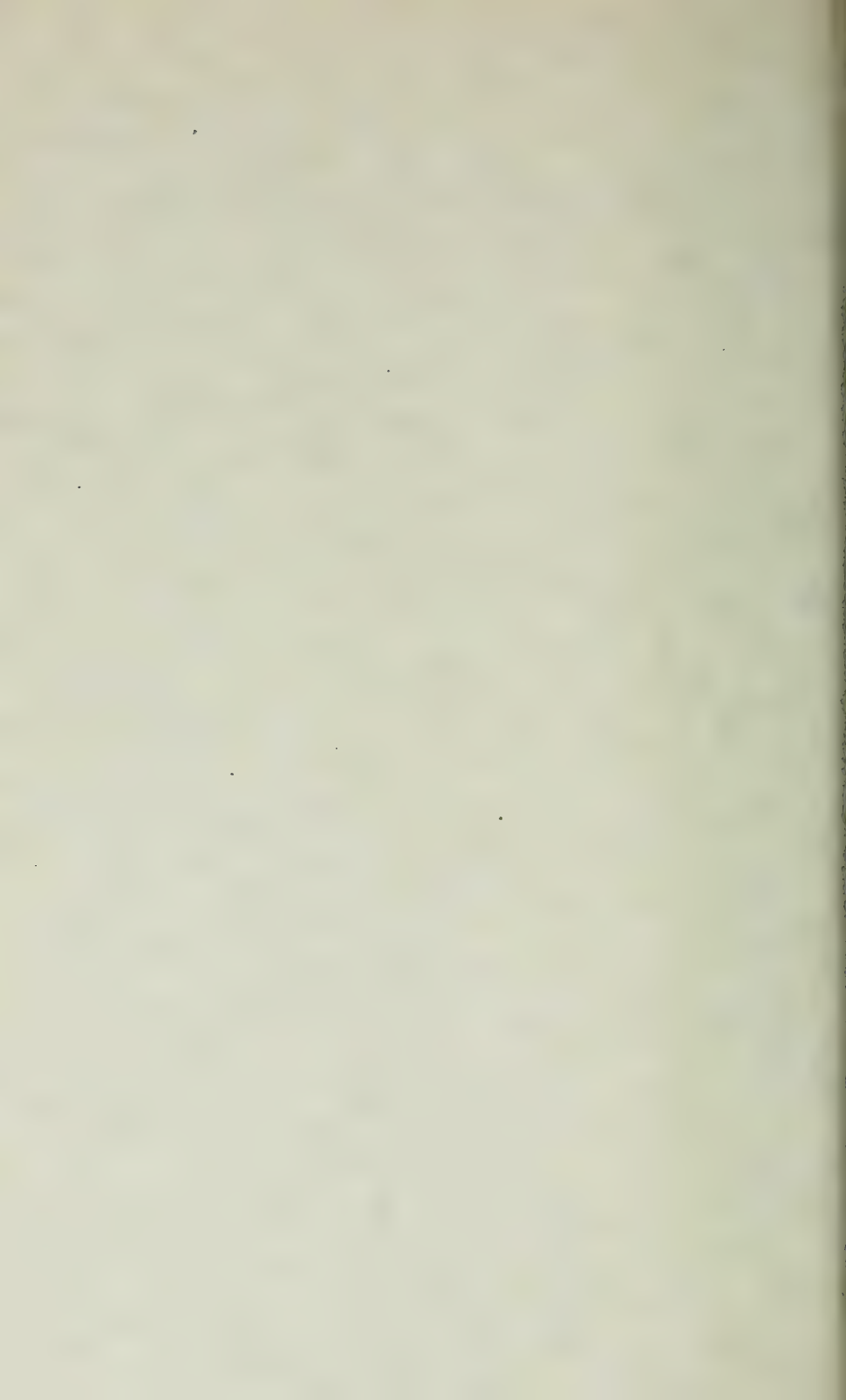
PAUL P. O'BRIEN,
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A. L. WIRIN and

J. B. TIETZ,

257 South Spring Street, Los Angeles 12,

Attorneys for Appellant.



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No. 10937

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern
District of California, and FRANCIS BIDDLE, Attorney
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Appellees.

PETITION FOR REHEARING.

The Decisions Relied on by This Court, Cited in the
Opinion of This Court, Are Not Final. The Cases
Are Now Pending in the Supreme Court Await-
ing Final Decision, Certiorari Having Been
Granted.

In affirming the judgment below, this Court, in an
opinion more sympathetic to the lot of the sincere con-
scientious objector at the hands of the law, than any
other appellate court during this war, seems to have re-

lied heavily upon *United States v. Estep* (C. C. A. 3), 150 F. (2d) 768, and *Smith v. United States* (C. C. A. 4), 148 F. (2d) 288. But on May 28, 1945, and on October 8, 1945, respectively, the Supreme Court granted certiorari in the *Smith* and *Estep* cases respectively. The cases in the Supreme Court bear Supreme Court, October Term, 1945, Nos. 66 and 292, respectively.

The cases were argued in the Supreme Court on November 7.

It is to be noted that the *Estep* case, in the Circuit Court of Appeals, was decided by a 3-2 Court.¹ The appellant has disclosed in his petition for the writ, that he is willing to take all of the administrative steps within the Selective Service System, which *Estep* took. Should the Supreme Court reverse the *Estep* case, and the judgment of this Court become a final in the interim in the instant case, Bagley will again lose his rights because of lack of prescience of what the Supreme Court may now decide.

The sincere conscientious objector ought not thus to lose his rights because of his inability to prophesy what the Supreme Court may decide tomorrow, in a field of law in which neither the lawyers practiced in the law, nor the judges learned in the law (except the Supreme Court Justices), are unable to foretell.²

¹The penchant for the Supreme Court's adoption of *dissenting* opinions by the Circuit Court judges is now a matter of common knowledge.

²Cf. Judge Leahy, dissenting, in *United States v. Estep*, 150 Fed. (2d) 768 (at p. 781), suggesting that *Estep* should not be prejudiced by his lack of "ability to distinguish between *Falbo v. United States* and *Billings v. Truesdell*."

Conclusion.

This Court should, accordingly, grant a rehearing, in order to await the decision of the Supreme Court in the *Smith* and *Estep* cases.

Respectfully submitted,

A. L. WIRIN and

J. B. TIETZ,

By A. L. WIRIN,

Attorneys for Appellant.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and that it is not interposed for delay.

A. L. WIRIN.

No. 10938

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE FRANKLIN FIRE INSURANCE CO.
OF PHILADELPHIA, PENNSYLVANIA,
a Corporation,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 133

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JAN 18 1945

No. 10938

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE FRANKLIN FIRE INSURANCE CO.
OF PHILADELPHIA, PENNSYLVANIA,
a Corporation,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

SUPPLEMENTAL
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In Two Volumes
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Pages 1 to 133

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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NAMES AND ADDRESSES OF COUNSEL
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MR. C. E. H. MALOY,
990 Dexter Horton Building
Seattle 4, Washington
Attorney for Appellee. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 718

OLUF B. HANNEY, HANS MIKELSEN, and
PAUL VOHL,

Plaintiffs,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA,
a corporation,

Defendant.

AMENDED COMPLAINT

For a first cause of action or count, plaintiffs
complain of defendant and allege:

I.

Plaintiffs are citizens and residents of the City
of Seattle, County of King, State of Washington;
defendant is a corporation incorporated under the
laws of the State of Pennsylvania. The matter in
controversy exceeds, exclusive of interest and costs,
the sum of Three Thousand Dollars (\$3000.00).

II.

On August 20, 1941, and at all times hereinafter
mentioned, the plaintiffs were the owners of the
good halibut boat called the hull #20, then being
built at Brown's Point, Tacoma, Washington, and
plaintiffs on or about August 20, 1941, desiring to

effect insurance against risks, including fire, on said halibut boat #20, then being built, and upon all materials being acquired and accumulated for her construction, and upon all apparel, ordinance, appurtenances, boats, furniture, fixtures, and materials being and to be acquired for and belonging and destined for said halibut boat #20, on August 20, 1941, at Seattle, Washington, in consideration of the payment by the plaintiffs to the defendant of a premium of \$111.00, the defendant made, executed and delivered to plaintiffs its policy of insurance in writing, a copy of which is [2] marked Exhibit "A" to plaintiffs' complaint on file herein, and by reference is made a part hereof, and a copy of which is in defendant's possession.

III.

Thereafter, and on or about November 20, 1941, plaintiffs and defendant, acting by Chester J. Chastek Co., defendant's duly authorized agent, entered into an oral agreement, whereby the defendant agreed to renew or extend said insurance for the period of 30 days from November 20, 1941, and the said defendant further agreed that it would renew said insurance for successive periods of 30 days thereafter, and keep said insurance in full force and effect until the building of said halibut boat #20 should be completed, such renewed or extended insurance to be upon the same terms and conditions as the hull policy and builder's risk policy hereinbefore mentioned, with the exception of such changes as might be necessary on account of

the progress of the building of such vessel, and the increased valuation thereof, in consideration of which the said plaintiffs promised and agreed to pay to said Chester J. Chastek Co., defendant's agent, additional premiums upon the receipt of bills from said Chester J. Chastek Co. evidencing the amount of such additional premiums; pursuant to such agreement, defendant renewed and extended such insurance for successive periods of 30 days each, to and including February 20, 1942; on February 20, 1942, the said defendant renewed and extended said insurance for a period of 30 days from February 20, 1942, to March 22, 1942; that said extended or renewed insurance was effective on said date, but the renewal endorsement was dated February 25, 1942; defendant's agent Chester J. Chastek Co. billed plaintiffs for the renewal premium of \$120.00, and plaintiffs paid the same to defendant's agent. The failure to date said endorsement February 20, 1942, [3] instead of February 25, 1942, renewing and extending said insurance was due to the fault and neglect of the said defendant and/or its agent, and such renewed and extended insurance was actually in force and effect; in the event defendant failed to renew and extend said insurance until February 25, 1942, the defendant violated and breached its oral agreement to keep such insurance renewed, extended, and in full force and effect.

IV.

In September, 1941, and to and inclusive of February 24, 1942, the plaintiffs were the owners of the halibut boat #20, and of tackle, apparel, furni-

ture, fixtures and material which belonged to and was destined for the halibut boat #20, then being built, all of which property was covered by the provisions of the above-described written policy of insurance, and all of which property was stored in locker #325 at the Salmon Bay Terminal of the Port of Seattle, City of Seattle, Washington; at all said times and while such above-described personal property was stored in said locker #325, and until after February 24, 1942, the plaintiffs were the sole and exclusive owners and in sole and exclusive possession and control of said locker #325, and all of such personal property was stored in such locker #325 during all of such time for the express purpose of being attached to, used upon and in the operation of said halibut boat #20 and in the equipping and outfitting and building of said halibut boat #20. On February 24, 1942, all the said above-described personal property was totally destroyed by fire, and all of such property became a total loss. Said property was at the time of said fire and loss of the value of \$14,160.14; an itemized statement of such personal property, together with the valuation of each item thereof, is marked Exhibit "B", attached to plaintiff's complaint on file herein, and made a part hereof. [4]

V.

Plaintiffs have made demand upon defendant for payment of said loss, that there is due and owing to plaintiffs from defendant the sum of \$14,160.14,

and defendant has failed, neglected and refused to pay the same or any part thereof.

For a Second Cause of Action and count against defendant, and in the event plaintiffs' first cause of action is not sustained, plaintiffs allege:

I.

Plaintiffs re-allege paragraphs I, III, IV and V of plaintiffs' First Cause of Action or count, hereinbefore set forth, and by reference thereto make the same a part of this cause of action or count.

II.

On or about August 20, 1941, the defendant, by its duly authorized agent, Chester J. Chastek Co., solicited of plaintiffs builder's risk and fire insurance coverage upon the halibut boat #20, at all times herein mentioned owned by plaintiffs, and all materials and equipment to be incorporated in or upon such vessel, owned by plaintiffs. Plaintiffs then informed Chester J. Chastek Co. that they desired builder's risk and fire insurance coverage upon the halibut boat #20 to be constructed, and upon all materials and equipment to be incorporated or used in the building, outfitting, and equipping of such vessel, and that they intended to purchase and store tackle, apparel, appurtenances, fixtures and materials at Seattle, Washington; it was then orally agreed between plaintiffs and defendant, acting by Chester J. Chastek Co., its duly authorized agent, that defendant would write and furnish to plaintiffs, and plaintiffs would accept from defend-

ant, such builder's risk and fire insurance coverage insuring the halibut boat #20, to be built, and all materials and equipment to be used [5] in her building, outfitting and equipment, whether located at Brown's Point, Tacoma, or at Seattle, Washington, for the period from August 20, 1941, to November 20, 1941, in consideration of the promise of plaintiffs to pay to defendant a premium of \$111.00. Thereafter, defendant, by its agent, Chester J. Chastek Co., made, executed and delivered to plaintiffs hull policy #44298, and attached thereto "Builder's Risk Form #50, Amended", a copy of which is marked Exhibit "A", attached to and made a part of plaintiffs' complaint on file herein, and made a part hereof by reference, the defendant, through its said agent, representing to plaintiffs that the following in such policy:

"On hull tackle, apparel, ordinance, munitions, artillery, engines, boilers, machinery, appurtenances, etc., (including plans, patterns, moulds, etc.) Boats and other furniture and fixtures and all material belonging and destined for Hull 20, building at Brown's Point, Tacoma, Washington, as per clauses hereinbelow specified."

and

"This insurance is also to cover all risks, including fire, while under construction and/or fitting out, including materials in buildings, workshops, yards and docks of the assured, or on quays, pontoons, craft, etc., and all risk while in transit to and from the works and/or the vessel wherever she may be lying."

and such policy, fully insured plaintiffs against all loss or damage by reason of the risks named therein, including fire, to all of the above-described character of property stored in the City of Seattle, which was intended and belonged, or was destined for the halibut boat #20, described in said policy. Plaintiffs had no knowledge or means of knowledge as to the truth or falsity of such representations, the truth and falsity of same was not readily ascertainable, and plaintiffs believed such representations to be true, and that said policy fully insured them as against loss or damage by fire to any tackle, apparel, appurtenances, fixtures and materials belonging and destined for the halibut boat #20, which they might store in the City of Seattle.

[6]

Wherefore, plaintiffs pray for judgment against defendant as follows:

First: For judgment upon plaintiffs' First Cause of Action or Count, in the sum of \$14,160.14, and interest.

Second: In the event recovery is denied upon plaintiffs' First Cause of Action or Count, for a decree of this Court reforming said policy of insurance, and particularly the "Builder's Risk Form #50, Amended", so that said policy shall insure the plaintiffs for the 30-day period from February 20, 1942 to March 22, 1942, and shall cover and insure tackle, apparel, appurtenances, fixtures and materials stored at Seattle during the currency of said

policies, and for a decree against defendant in the sum of \$14,160.14, and interest.

Third: For plaintiffs' costs herein expended.

C. E. H. MALOY

Attorney for Plaintiffs.

United States of America

State of Washington

County of King—ss.

Paul Vohl, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs above named; that he has read the foregoing Amended Complaint, knows the contents thereof, and believes the same to be true.

PAUL VOHL

Subscribed and sworn to before me this 10th day of September, 1943.

[Seal]

C. E. H. MALOY

Notary Public in and for the State of Washington,
residing at Seattle.

Copy Received Sept. 10, 1943.

HAYDEN, MERRITT, SUM-
MERS & BUCEY

Attorneys

[Endorsed]: Filed Sep. 10, 1943. [7]

PLAINTIFFS' EXHIBIT A

Pacific Northwest Marine Department
Endorsement

Additional Premium \$75.00

Return Premium \$....

BUILDERS' RISK POLICY

(Classification or Conveyance)

For and in consideration of an additional premium of \$75.00 (being figured at 25c% on \$30,000.00 insurance) it is hereby understood and mutually agreed that this policy is extended for one month from March 22, 1942 to April 22, 1942, beginning and ending at Noon Pacific Standard Time.

All Other Terms and Conditions of this
Policy Remain Unchanged

Attached to and forms part of Policy No. 44298 of The Franklin Fire Insurance Co. issued to Peter Petersen d/b/a Marine View Boat Building Co., Builder, and Oluf F. Hanney, Owner.

Dated at Seattle, Washington, March 22, 1942.

CHESTER J. CHASTEK CO.

MAin 9840

KENNETH H. WHEELock

aw 3/20/42 [8]

Pacific Marine Department

Endorsement

Additional Premium: \$120.00

Return Premium \$. . . .

BUILDERS' RISK

(Classification or Conveyance)

For and in consideration of an additional premium of \$75.00 (being figured @ 25c on \$30,000.00 insurance), it is hereby understood and mutually agreed that the amount of insurance under this policy is increased to \$30,000.00 valued at \$30,000.00 and notwithstanding anything contained herein to the contrary, it is hereby understood and mutually agreed that this policy is extended to cover machinery or its appurtenances, and it is further understood and agreed that this policy is extended for one month from February 20, 1942 to March 22, 1942.

For and in consideration of a further additional premium of \$45.00, it is hereby understood and mutually agreed that this policy is extended to cover launching and trial trips subject to the following clauses:

“All risks of launching and breakage of the ways.

This insurance is also to cover all risks of trial trips, loaded or otherwise, as often as required, and all risks whilst proceeding to and returning from the trial course but warranted that all trials shall be carried out within a dis-

tance by water of 100 nautical miles of the place of construction or held covered at a rate to be arranged.

In case of failure of launch, underwriters to bear all subsequent expenses incurred in completed launch."

**All Other Terms and Conditions of This
Policy Remain Unchanged**

Attached to and forms part of Policy No. 44298 of The Franklin Fire Insurance Company issued to Peter Petersen d/b/a Marine View Boat Building Co., Builder, and Oluf B. Hanney, Owner.

Dated at Seattle, Washington, February 25, 1942.

[Stamped]: Received Feb. 27, 1942. Chastek.

[9]

Marine Department

[In longhand]: 2/Illegible/42

January 20, 1942

to be attached to and forming part of

Policy No. 44298

Endorsement of The Franklin Fire Insurance Company.

Assured: Peter Petersen d/b/a Marine View Boat Building Co., Builder, and Oluf B. Hanney, Owner.

For and in consideration of an additional premium of \$37.50, (being figured at 25c% on \$15000.00 insurance) it is hereby understood and mutually agreed that this policy is extended for thirty (30) days from January 20, 1942, to February 20, 1942, beginning and ending at Noon, Pacific Standard Time.

It is further understood and agreed that the valuation of the hull for insurance purposes is changed to read \$15,000.00 with the amount of insurance carried \$15,000.00.

All other terms and conditions of policy remaining unchanged.

.....

Agent

aw 1/26/42 [10]

Pacific Marine Department

Endorsement

Additional Premium \$22.50

Return Premium \$....

BUILDERS' RISK

(Classification or Conveyance)

For and in consideration of an additional premium of \$22.50, it is hereby understood and agreed that this policy is extended to cover launching and trial trips subject to the following clauses:

“All risks of launching and breakage of the ways.

This insurance is also to cover all risks of trial trips, loaded or otherwise, as often as required, and all risks whilst proceeding to and returning from the trial course but warranted that all trials shall be carried out within a distance by water of 100 nautical miles of the place of construction or held covered at a rate to be arranged.

In case of failure of launch, underwriters

to bear all subsequent expenses incurred in completing launch.”

Notwithstanding anything contained herein to the contrary, the following clause is deleted from the policy to which this endorsement is attached:

Notwithstanding anything contained herein to the contrary, it is mutually understood and agreed between the Assured and this Company that this policy does not cover machinery or its appurtenances.

and it is understood and agreed that this policy is extended to cover machinery or its appurtenances.

It is further understood and agreed that the completed price of this hull and machinery is \$30,000 and this policy is written in the amount of \$15,000 valued at \$30,000.

**All Other Terms and Conditions of This
Policy Remain Unchanged**

Attached to and forms part of Policy No. 44298 of Franklin Fire Insurance Company issued to Peter Petersen d/b/a Marine View Boat Building Co., Builder, and Oluf B. Hanney, Owner.

Dated at Seattle, Washington, December 23, 1941.

..... [11]

Pacific Northwest Marine Department
Endorsement

Additional Premium \$37.50
Return Premium \$....

BUILDERS' RISK

(Classification or Conveyance)

For and in consideration of an additional premium of \$37.50, (being figured at 25c% on \$15000.00 insurance) it is hereby understood and mutually agreed that this policy is extended for thirty (30) days from December 20, 1941 to January 20, 1942, beginning and ending at Noon, Pacific Standard Time.

All Other Terms and Conditions of This
Policy Remain Unchanged

Attached to and forms part of Policy No. 44298 of The Franklin Fire Insurance Co. issued to Peter Petersen d/b/a Marine View Boat Building Co., Builder, and Oluf B. Hanney, Owner.

Dated at Seattle, Washington, December 20, 1941.

CHESTER J. CHASTEK CO.

MAin 9040

aw 12/18/41 [12]

Marine Department

November 20, 1941

to be attached to and forming part of

Policy No. 44298

Endorsement of Franklin Fire Insurance Company.

Assured: Peter Petersen d/b/a Marine View Boat Building Co., Builder, and Oluf B. Hanney, Owner.

For and in consideration of an additional premium of \$37.50, (being figured at 25c% on \$15000.00 insurance) it is hereby understood and mutually agreed that this policy is extended for thirty (30) days from November 20, 1941 to December 20, 1941, beginning and ending at Noon, Pacific Standard Time.

All other terms and conditions of policy remaining unchanged.

CHESTER J. CHASTEK CO.

MAin 9040

KENNETH H. WHEELOCK

Agent

aw 11/19/41 [13]

Additional clauses referred to on the face hereof:

Damage to Ways Clause: Nothing in this policy shall be construed to insure against or cover any loss, damage or expense in connection with docks, shipways, tools or any other property of the shipyard not intended to be incorporated in the vessel, excepting staging, scaffolding and similar temporary construction the value of which is included in the contract price of the vessel and excepting any loss, damage or expense for which underwriters may be liable under the protection and indemnity clauses; provided, nevertheless, that in the case of failure of launch, Underwriters shall bear all subsequent expenses incurred in completing launch.

Builders' Risk Constructive Total Loss Clause: There shall be no recovery for a Constructive Total Loss under this policy unless the expense of recovering the vessel and restoring her to the condition

she was in prior to the loss would exceed her value in that condition, which value shall be determined by applying to the completed contract price the percentage of the vessel which was completed at the time of the loss; and no claim for a Constructive Total Loss hereunder shall exceed this policy's proportion of the value so computed, plus this policy's proportion of any damage to material insured hereunder and not yet installed in the vessel.

This insurance is understood and agreed to be subject to English Law and usage as to Liability for and in settlement of any and all claims.

Notwithstanding anything contained herein to the contrary it is mutually understood and agreed between the Assured and this Company that this policy does not cover machinery or its appurtenances.

[14]

(Cut)

The Franklin Fire Insurance Co. of Philadelphia
Pennsylvania

No. 44298

Amount \$15000.00

Rate 74c%

Premium \$111.00

By This Policy of Insurance

Does Insure—Peter Petersen d/b/a Marine View
Boat Building Co., Builder, and Oluf B.
Hanney, Owner.

Loss, if any, payable to Assureds

or order, as follows:

In consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred Eleven and no/100 Dollars as a premium at and after the rate of 74c% per cent for such insurance the said Company takes upon itself the burden of such insurance to the amount of Fifteen Thousand and no/100 Dollars and promises and agrees with the assured, their Executors and Administrators in all respects truly to perform and fulfill the Contract contained in this Policy And it is hereby agreed and declared that the said Insurance shall be and is an insurance upon As Per Form Attached valued at \$15000.00—Fifteen Thousand and no/100 Dollars of and in the good Halibut Boat called the Hull #20 (Being Built) or by whatsoever other name or names the said ship is or shall be named or called, lost or not lost, at and from August 20, 1941 to November 20, 1941, Beginning and Ending at Noon, Pacific Standard Time.

Touching the adventures and perils which the said Company is content to bear and does take upon itself; they are of the seas, fires, pirates, rovers, assailing thieves, jettisons, criminal barratry of the master and mariners, and of all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof.

In case of any loss or misfortune it shall be lawful and necessary for the Assured, their factors, servants and assigns, to sue, labor, and travel for,

in and about the defence, safeguard, and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance; the charges whereof the said Company shall bear in proportion to the sum hereby insured.

It is expressly declared and agreed that no acts of the said Company or Assured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Either party may cancel this Policy by giving fifteen days' notice in writing, if in port of destination; if on voyage the cancellation to take effect three days after arrival at port of destination; if at the option of this Company pro-rata rates, if at the request of the Assured short rates, will be charged. From all return premiums the same percentage of deduction (if any) shall be made as was allowed by this Company on receipt of original premium.

In Witness Whereof, this Company has executed and attested these presents; but this Policy shall not be valid unless countersigned by a duly authorized Agent of this Company at place of issue.

H. V. SMITH

President

WALTER F. BEYER,

Secretary

Countersigned at Seattle, Wash. this 20th day of August, 1941

CHESTER J. CHASTEK CO.

MAin 9040

KENNETH H. WHEELOCK

[Printed in margin]:

Unless physically deleted by the Underwriters, the following warranties shall be paramount and shall supersede and nullify any contrary provision of the Policy:

Notwithstanding anything to the contrary contained in the Policy, this insurance is:

(a) Warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or war-like operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

(b) Warranted free of loss or damage caused by or resulting from strikes, lockouts, labor disturbances, riots, civil commotions or the acts of any person or persons taking part in any such occurrence or disorder.

If war risks and/or strike, riot and civil commotion risks are hereafter insured by endorsement on the policy, such endorsement shall supersede the above warranties only to the extent that the terms of the endorsement are inconsistent with the warranties and only while such endorsement remains in force. [15]

HULL POLICY

The Franklin Fire Insurance Company
of Philadelphia
Pennsylvania
Marine Department

No. 44298

Assured: Peter Petersen d/b/a Marine View
Boat Building Co., Builder, and Oluf B. Hanney,
Owner.

Vessel: Hull #20 (Being Built)

Amount: \$15000.00

Rate: 74c%

Premium: \$111.00

Expires: November 20, 1941

Chester J. Chastek Co.
Insurance and Bonds
Insurance Bldg.
Second Ave. at Madison St.
MAin 9040
Seattle

Pacific Marine Department
341 Montgomery St., San Francisco, Calif.
Clayton E. Roberts, Marine Manager [16]

PLAINTIFFS' EXHIBIT "B"

LIST OF PROPERTY DESTROYED

Number	Quantity	Value
6500 only 6" Sel. corks.....		1430.00
260 fathoms 3" - 4 Strand Bolt Rope.....	468 lbs.	149.76
65 only 4" inch Brass Rings.....	65 lbs.	58.50
200 fathoms 2¼ - 4 Strand Purse Rope....	234 lbs.	77.22
175 only Montara bags and Rubber.....	175	743.75
14 only C.J.H. 16" Rubber Boveys.....	14	112.00
40 fathoms 3½ - 4 Strand Bolt Rope.....	90 lbs.	29.70
20 only 3 inch galv. Rings.....	12½	14.17
120 fathoms 3½ Manila Rope	258 lbs.	67.08
1 strip 300 fathoms 1¾ - 21 th 20 mesh Cotton Netting	190 lbs.	170.24
1 strip 300 fathoms 1¾ - 12 th 400 meshes Deep Cotton Netting.....	1400 lbs.	1411.20
4 strip 300 fathoms 1¾ - 9th 400 mesh Deep Cotton Netting	3600 lbs.	4060.80
1 strip 300 fathoms 1¾ - 54 th 6" mesh Cotton Netting	900 lbs.	712.80
11 only sq Book Mattresses	11	104.50
11 only Vest Life Preservers.....	11	48.40
50 Fathoms 3¾" Manila Rope	123 lbs.	31.98
50 fathoms 3½" Manila Rope	108 lbs.	28.08
1 large Purse Drum	1	175.00
1 small Purse Drum	1	75.00
2 only 1" inch galv. Screw Anchor Shackles	2	4.40
2 only 7/8" galv. Screw Anchor Shackles	2	3.40
2 only 7" 21-C galv. Wood Blocks.....	2	4.90
2 only 7" 22-C galv. Wood Blocks.....	2	7.90
50 fathoms 2½ Manila Rope	59 lbs.	15.34
1 only 5 gal. garbage can.....		2.25
80 only ½ x 6 galv. Purse Rings.....	80	96.00
2 only 1" galv. Screw Anchor Shackle..	2	4.40
2 only 1" galv. Side Hooks.....	2	3.00
1 only 8" galv. Cleat		1.10
2 only Bandir Hoops	2	11.00
4000 lbs. 4 oz. 5/8" Leads		520.00
175 fathoms 4½" Manila Rope.....	630 lbs.	201.60
1 only 10'x10' No. 6. Brailer Canvas....		12.00

Number	Quantity	Value
2 200 mesh x 200 mesh 1 $\frac{3}{8}$ mesh 54 th Cotton Netting	124 lbs.	98.21
4 only Brailer Handles	4	8.00
10 tons $\frac{3}{4}$ H.g. Salts	10	190.00
4 only No. 2 Scoop Shovels.....	4	7.00
1 only Oak David	1	85.00
1 strip 200 fathoms 400 mesh 1 $\frac{3}{8}$ meshes 6 th Cotton Netting.....	520	586.56
1 only Submarine Light and cord.....	1	100.00
1 strip 30 fathoms 1 $\frac{3}{8}$ - 18th 400 mesh Deep Cotton Netting	180 lbs.	161.28
1 strip 30 fathoms 1 $\frac{3}{8}$ - 18th 400 mesh Deep Cotton Netting	180 lbs.	161.28
1 strip 30 fathoms 1 $\frac{3}{8}$ - 15 th 400 mesh Deep Cotton Netting	163 lbs.	157.08
1 only Life-Boat		103.00
2 per. 10 ft. Ash Oars	40 ft.	14.00
2 per. No. 3 galv. Oar locks.....	2	2.00
200 fathoms 4 $\frac{1}{2}$ " Manila Rope.....	720	194.40
4 only 1 $\frac{1}{2}$ " galv. Open Turnbuckles J. H.	4	5.72
350 fathoms $\frac{5}{8}$ " galv. 6/24 Purse Wire....		330.00
4 15 fathoms 5" Manila Rope.....	267 $\frac{1}{2}$ lbs.	72.22
Pen Boards		250.00
1 only 12" galv. 22-C Com Double Wood Blocks	1	15.65
2 only 12" galv. 21-C Com Single Wood Blocks	2	19.80
2 only 10" galv. 22-C Com Double Wood Blocks	2	18.00
2 only 10" galv. 21-C Com Single Wood Blocks	2	11.50
1 only 10" galv. Blocks	1	15.00
50 fathoms $\frac{5}{8}$ " galv. 6/24 Purse Wire....		50.00
40 ft. 2" Rubber Deck Hose.....	40	32.00
1 only 2" Brass Hose Nozzle.....		3.00
4 only Deck Scurbers and Hande.....	4	4.60
2 only 12 qt. Heavy galv. Buckets.....	2	3.50
1 strip 160 fathom 1 $\frac{3}{8}$ - 9th 400 mesh Deep Cotton Netting	480 lbs.	541.44
2 only Hand Made Purse Blocks.....	2	70.00

Number	Quantity	Value
2 only Unloading Brailers.....	2	15.00
1 only 10" Cargo Block.....	1	35.00
		<hr/>
		13,747.71
	Sales Tax	412.43
		<hr/>
	Total	14,160.14
		[19]

[Title of District Court and Cause.]

ORDER OF DISMISSAL

The above entitled action having duly and regularly come on for hearing before the above entitled court, the undersigned Judge presiding, upon the motion of plaintiffs to dismiss without prejudice and without costs the second cause of action contained in their amended complaint, and it appearing to the court that considering the status of the record this dismissal should not be permitted unconditionally, and that plaintiffs should be required to elect to stand and rely upon their first cause of action in said amended complaint and upon appeal from judgment heretofore entered by the court dismissing the same, or upon their second cause of action in said amended complaint; and it further appearing to the court that the plaintiffs, through C. E. H. Maloy, Esquire, their attorney of record, has in open court made election in behalf of said plaintiffs to stand and rely upon said first cause of action, and to waive said second cause of action; and the court being otherwise fully advised;

Now, Therefore, it is hereby Ordered that said

second cause of *caust* be, and the same hereby is, dismissed without costs.

Done in open court this 29th day of November, 1943.

JOHN C. BOWEN

United States District Judge

Approved by

C. E. H. MALOY

Attorney for Plaintiffs

Approved by:

MATT STAFFORD

LANE SUMMERS

Attorneys for Defendant.

[Endorsed]: Filed Nov. 29, 1943. [20]

Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER
RULE 36

Defendant, The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, requests plaintiffs, Oluf B. Hanney, Hans Mikelsen and Paul Vohl, to make on or before October 15, 1944, the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

(1) That the following document, exhibited with this request, is genuine:

(1)-a. Agreement of May 14, 1941, between Peter Petersen and Oluf B. Hanney.

(2) That each of the following statements is true:

(2)-a. That performance by Peter Petersen of the contract of May 14, 1941, exhibited herewith, did not require the use of any of the property described in Exhibit B, attached to plaintiff's original complaint herein.

(2)-b. That there was not incorporated in Hull #20 during its construction by Peter Petersen under the contract May 14, 1941, exhibited herewith, any of the following items:

6500 only 6" Sel. corks

260 fathoms 3"—4 strand Bolt Rope

65 only 4" inch Brass Rings

200 fathoms 2 $\frac{1}{4}$ —4 strand purse rope

175 only Montara bags and Rubber

14 only C.J.H. 16" Rubber Boveys

40 fathoms 3 $\frac{1}{2}$ —4 strand Bolt Rope

20 only 3 inch galv. Rings [21]

120 fathoms 3 $\frac{1}{2}$ Manila Rope

1 strip 300 fathoms 1 $\frac{3}{8}$ —21 th. 20 mesh cotton netting

1 strip 300 fathoms 1 $\frac{3}{8}$ —12 th. 400 meshes Deep Cotton Netting

4 strip 300 fathoms 1 $\frac{3}{8}$ —9 th. 400 mesh Deep Cotton Netting

1 strip 300 fathoms 1 $\frac{3}{8}$ —54 th. 6" mesh Cotton Netting

50 fathoms 3 $\frac{3}{4}$ " Manila Rope

50 fathoms 3 $\frac{1}{2}$ " Manila Rope

50 fathoms 2 $\frac{1}{2}$ Manila Rope

1 only 5 gal. garbage can

80 only 1 $\frac{1}{2}$ x 6 galv. Purse Rings

- 2 only Bandir Hoops
- 4000 lbs. 4 oz. 5/8" Leads
- 175 fathoms 4 1/2" Manila Rope
 - 1 only 10'x10' No. 6 Brailer Canvas
 - 2 200 mesh x 200 mesh 1 3/8 mesh 54 th. Cotton Netting
 - 4 only Brailer Handles
- 10 tons 3/4 H.g. Salts
 - 4 only No. 2 Scoop Shovels
 - 1 strip 200 fathoms 400 mesh 1 3/8 meshes 6 th. Cotton Netting
 - 1 only Submarine Light and cord
 - 1 strip 30 fathoms 1 3/8—18 th. 400 mesh Deep Cotton Netting
 - 1 strip 30 fathoms 1 3/8—18 th. 400 mesh Deep Cotton Netting
 - 1 strip 30 fathoms 1 3/8—15 th. 400 mesh Deep Cotton Netting
 - 2 per. 10 ft. Ash Oars
- 200 fathoms 4 1/2" Manila Rope
- 350 fathoms 5/8" galv. 6/24 Purse Wire
 - 4 15 fathoms 5" Manila Rope
- 50 fathoms 5/8" galv. 6/24 Purse Wire
- 40 ft. 2" Rubber Deck Hose
 - 1 only 2" Brass Hose Nozzle
 - 4 only Deck Scurbers and Hande
 - 2 only 12 qt. Heavy Galv. Buckets
 - 1 strip 160 fathoms 1 3/8—9 th. 400 Mesh Deep Cotton Netting
 - 2 only Unloading Brailers

(2)-c. That during September, 1941, all of the property described in Exhibit B, attached to plain-

tiffs' original complaint herein, was sold by Henry Stakset of Tacoma, Washington.

(2)-d. That during September, 1941, all of the property described in Exhibit B, attached to plaintiffs' original complaint herein, was sold by Henry Stakset of Tacoma, Washington, for the total price of \$4000.00.

(2)-e. That all of the property described in Exhibit B, attached to plaintiffs' original complaint herein, was used, second-hand property at the time it was sold by Henry Stakset in September, 1941.

[22]

(2)-f. That the agreement of May 14, 1941, exhibited with this request, is the agreement under which Hull No. 20, referred to in said agreement and in Franklin Fire Insurance Company of Philadelphia, Pennsylvania, policy number 44298, was constructed.

(2)-g. That performance of the contract of May 14, 1941, exhibited herewith, by Oluf B. Hanney, one of the plaintiffs herein, did not require said Oluf B. Hanney to acquire any of the property described in Exhibit B, attached to plaintiffs' original complaint herein.

(2)-h. That performance of the contract of May 14, 1941, exhibited herewith, by Oluf B. Hanney, one of the plaintiffs herein, did not require said Oluf B. Hanney to provide for use in the construction of Hull No. 20 any of the property described in

Exhibit B, attached to plaintiffs' original complaint herein.

HAYDEN, MERRITT, SUM-
MERS & STAFFORD
By MATTHEW STAFFORD
Attorneys for Defendant [23]

AGREEMENT

This Agreement made and entered into this 14th day of May, 1941, by and between Peter Petersen, of Brown's Point, Tacoma, Washington, doing business as Marine View Boat Building Co. herein called "First Party" and Oluf B. Hanney of Ketchikan, Alaska, herein called "Second Party"

Witnesseth

Whereas, second party is desirous of having built for him a purse seine type of fishing vessel, and

Whereas, first party is engaged in the business of building such type of vessels and is desirous of building such vessel for said second party.

Now, Therefore, It Is Hereby Agreed by and between the parties hereto as follows:

That first party agrees to build and construct in a first-class workmanlike manner, a purse seine type of vessel in accordance with plans and specifications to be drawn by first party, and approved by second party,—said construction to be as is customary in vessels of this type and, to more specifically—both as to equipment and materials—be similar to those used in the construction and equipping of the D. S. "Nordic Pride" a partial itemization of the require-

ments of said vessel and its dimensions to be as follows, to-wit:

Length over all—76 feet

Beam—20 feet

Moulded depth—9'6"

Keel—12 x 14"

Stem—12 x 18"

Keelson—14 x 16"

Deadwood—12 x 14"

Shaft log—12 x 14"

Sternpost—12 x 14" (oak)

Horn timber—12 x 12"

Guards—2 x 8"

Frames—3 x 4" net (oak 10" center)

Bilge stringers 3 x 6"

Planking 2" net

Inside ceiling 1¾" net

Deck beams 10 x 10" and 6 x 10"

Knees 6, 6 x 6"

Deck 2 x 3½" net

Caulking 1 thread oakum and 1 thread cotton

Covering board 2¼" net

Coamings 4"

Fuel tanks—4 thousand gallons

Lubrication oil tanks—200 gallons [24]

Water tanks—1200 gallons

Mast—42'

Boom—34'

Standing rigging 5/8"

One 8" Hawse pipe and 4 mooring rings

Deckhouse and forecastle and one turntable

3 coats of paint throughout

Said vessel shall be complete in all respects and shall be equipped with:

A 240 H.P. Washington Diesel Engine and its equipment, including two steady bearings, babbitted

4 stuffing box hanger bolts

6 stern-bearing hanger bolts

Doran 3-blade bronze propeller, one #3 whistle, one Quincy auxilliary air compressor

2 24 x 88" airtanks

one sailing clutch

one Electro Pneumatic Engine Controls

One propeller shaft brake and other standard equipment, spare engine parts and tools.

It Is Understood and Agreed that the vessel herein contemplated shall be known and designated as Hull #20 during its construction, and that the keel for the same shall be laid immediately after Hull #16 (now being constructed) shall have been launched;

It Is Further Understood and Agreed that said vessel shall be built in as speedily a manner *and* diligence and good workmanship will permit, and that the finished boat shall be delivered to second party at Astoria, Oregon, immediately after completion and installation of engine, said trip to Astoria, Oregon, to constitute said vessel's trial trip.

It Is Further Agreed, however, that first party shall not be held liable to second party for any delay in the delivery of said vessel caused by strikes, riots, fire, the elements or Acts of God, or

delay in delivery of materials for or accidents to said vessel during the course of construction, nor for any delay in the building of said vessel which is beyond the control of first party.

It Is Further Understood and Agreed that first party shall procure and have issued in favor of second party, and second party's wife, a bond issued by a reliable surety company, in the sum of Thirty Thousand (\$30,000.00) Dollars, to be modified by being increased or decreased according to the final con- [25] tract price to be determined as hereinafter provided—said bond to be conditioned that first party will perform and fulfill the terms and conditions of this contract and deliver said vessel to second party at Astoria, Oregon, free and clear of any and all claims and liens; It Is Agreed, however, that second party shall pay the premium for such bond.

It Is Further Understood and Agreed that first party shall procure builder's risk insurance—the premium for which second party shall also pay.

It Is Further Understood and Agreed that second party shall pay unto first party for said vessel—complete with equipment and engine—the sum of Thirty Thousand (\$30,000.00) Dollars, payable as follows, to-wit:

Payment #1—Two Thousand (\$2000.00)
Dollars contemporaneously herewith

Payment #2—Twenty-five Hundred (\$2-
500.00) Dollars when keel is laid

Payment #3—Twenty-five Hundred (\$2-
500.00) Dollars when ribs are in

Payment #4—Twenty-five Hundred (\$2-500.00) Dollars when decking is laid

Payment #5—Twenty-five Hundred (\$2-500.00) Dollars when vessel is launched

Payment #6—Eight Thousand (\$8,000.00) Dollars when engine is ready for delivery

Payment #7—Two Thousand (\$2,000.00) Dollars when winches are installed

Payment #8—Balance after trial trip to Astoria, Oregon and acceptance of vessel by second party at Astoria, Oregon.

It Is Understood that payments need not necessarily be made in the order above designated and, if requested by the bonding company furnishing the performance bond contemplated herein, It Is Further Agreed that payments Nos. 1, 6 and One Thousand Nine hundred sixty-six (\$1,966.00) Dollars of payment No. 8 shall be made directly to the Washington Iron Works, Seattle, from whom it is agreed the engine shall be purchased, or said payments shall be made jointly to first party and said Washington Iron Works and the balance of said payment No. 8—whether more or less than Three Thousand (\$3,000.00) Dollars to be determined as hereinafter provided—shall be made to both first party and the bonding company furnishing the performance bond contemplated herein. [26]

It Is Also Understood And Agreed that second party shall have the right and privilege of selecting the winches, toilet, sinks, pipe railings, or installation pipes or piping, all finish hardware, stove, and

all fitting for cabin, galley and pilot house, light plant, and—that the total sum of this contract shall be increased or decreased from Thirty Thousand (\$30,000.00) Dollars accordingly as the purchase price of such items—together with the expense of the installation of the engine for said vessel and installation of the light plant and wiring in said vessel, and expense of installation of winches, and sinks,—totals, when added to the sum of Twenty-seven Thousand nine hundred sixty-six (\$27,966.00) Dollars.

It Is Also Understood And Agreed that in the event of sales tax be legally required to be paid, that second party shall pay the same.

In Witness Whereof, the parties hereto have caused these presents to be executed the day and year first above written.

(Signed) PETER PETERSEN

First Party

(Signed) O. B. HANNEY

Second Party

[Endorsed]: Filed Oct. 19, 1944. [27]

[Title of District Court and Cause.]

STATEMENT IN RESPONSE TO REQUEST
FOR ADMISSIONS UNDER RULE 36

Now come the plaintiffs and object to each and every request for admissions heretofore made by the defendant upon plaintiffs upon the ground and

for the reason that each and every of said questions embraced in such request for admissions is wholly irrelevant and immaterial to any issue in this case.

Subject to the above objection to answering the request for admissions, plaintiffs make the following statement:

(1) The documents, i.e., agreement of May 14, 1941, between Peter Petersen and Oluf B. Hanney, appears to be a true copy of the original agreement.

(2) (2-a) The performance by Peter Petersen of the contract of May 14, 1941, did not require the use of any of the property described in Exhibit "B" attached to plaintiffs' complaint.

(2-b) The items described were not incorporated in hull #20 during the construction by Peter Petersen under the contract of May 14, 1941.

(2-c) During August, 1941, all the property described in Exhibit "B" of plaintiffs' complaint was sold by Henry Stakset of Tacoma, Washington.

(2-d) During August, 1941, all the property described in Exhibit "B" of plaintiffs' complaint was sold by Henry Stakset of Tacoma, Washington, for Four Thousand and 00/100 (\$4,000.00) Dollars.

(2-e) That some of the property described in Exhibit "B" of plaintiffs' complaint was used and second hand property at [28] the time it was sold by Henry Stakset in August, 1941, and some of the property was new.

(2-f) The agreement of May 14, 1941, is

the agreement under which hull #20 was constructed.

(2-g) The performance of the contract of May 14, 1941, did not require Hanney to acquire any of the property described in Exhibit "B".

(2-h) Performance of the contract of May 14, 1941, did not require Hanney to provide for use in the construction of hull #20 any of the property described in Exhibit "B".

/signed/ C. E. H. MALOY

Attorney for Plaintiffs

United States of America

State of Washington

County of King—ss:

C. E. H. Maloy, being first duly sworn, on oath deposes and says:

That he is the attorney for the plaintiffs above named; that the plaintiffs are at the present time absent from King County, State of Washington, and, therefore, he makes this verification on their behalf; that he has read the foregoing statement in response to request for admissions, knows the contents thereof, and believes the same to be true.

/signed/ C. E. H. MALOY

Subscribed and sworn to before me this 10th day of October, 1944.

(seal) /signed/ RAY C. MOLITER

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Copy received Oct. 11.

HAYDEN, MERRITT, SUM-
MERS & STAFFORD
Attorneys.

[Endorsed]: Filed Oct. 12, 1944. [29]

Title of District Court and Cause.

DEFENDANT'S SECOND AMENDED AN-
SWER TO PLAINTIFFS' AMENDED
COMPLAINT

Comes now the defendant above named and here-
by makes its Second Amended Answer to the first
cause of action in the Amended Complaint of the
plaintiffs above named, to-wit:

I.

As to paragraph IV of such first cause of action,
(1) the defendant denies that the property listed
and described by Exhibit B was covered in whole or
in part by the insurance policy of which Exhibit
A is a copy; (2) the defendant (in harmony with
admissions made and filed in behalf of the plaintiffs
herein) denies that the property listed and described
by Exhibit B was in whole or in part property
stored by the plaintiffs for the purpose of being
attached to or used upon Halibut Boat Hull No.
20 in the building or construction thereof, or was
property belonging to or destined for the building
or construction of Halibut Boat Hull No. 20; and
(3) the defendant denies that the property listed

and described by Exhibit B was at the time lost by fire of the value of \$14,160.14.

II.

As to paragraph V of such first cause of action, the defendant denies that there is due or owing to the plaintiffs from the defendant the sum of \$14,160.14, or any lesser sum.

Wherefore, having fully answered, the defendant prays that the above entitled action be dismissed and that the defendant have judgment for its costs and disbursements herein.

HAYDEN, MERRITT SUM-
MERS & STAFFORD
LANE SUMMERS
MATTHEW STAFFORD

Attorneys for Defendant

Plaintiffs hereby consent to the filing of the above.
Dated Oct. 25, 1944.

C. E. H. MALOY

Attorney for Plaintiffs

[Endorsed]: Filed Oct. 28, 1944. [30]

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT UNDER RULE 56

Comes now the defendant and moves for summary judgment dismissing the above entitled action with prejudice and with costs and disbursements

to be taxed in favor of the defendant and against the plaintiffs upon the ground that there is no genuine issue as to any material fact (except as to the amount of damages) and that the defendant is entitled to such judgment as a matter of law.

This motion is based upon the record herein including the first cause of action in the plaintiffs' amended complaint, the second amended answer of the defendant, the depositions, the defendant's "request for Admissions under Rule 36" and the plaintiffs' "Statement in Response to Request for Admissions under Rule 36".

HAYDEN, MERRITT SUM-
MERS & STAFFORD
MATTHEW STAFFORD
LANE SUMMERS

Copy received 10/27/44.

C. E. H. MALOY

[Endorsed]: Filed Oct. 27, 1944. [31]

In the United States District Court for the Western
District of Washington, Northern Division

Court Room No. 1, Hon. John C. Bowen, Presiding.
Tuesday, October 31, 1944.

[Title of Cause.]

No. 718

DEPOSITIONS PUBLISHED
MOTION FOR SUMMARY JUDGMENT
DENIED

Now on this 31st day of October, 1944, this cause comes on before the Court for hearing on the motion of the defendant for summary judgment. Attorney C. E. H. Maloy appears for the plaintiffs, and attorneys Lane Summers and Matthew Stafford appear for the defendant. By stipulation [32] of counsel, the depositions of Henry Stakset and Kenneth H. Wheelock are ordered published. A memorandum supporting the defendant's motion is filed. The motion is argued and denied.

(Journal No. 33 Page 762) [33]

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

The above entitled matter by consent of plaintiffs and defendant having duly and regularly come on for hearing before the above entitled court, the

undersigned Judge presiding, at 10 A.M. on the 31st day of October, 1944, prior to trial in said action, upon the defendant's motion for summary judgment under Rule 56, and arguments supporting and opposing said motion having been made and considered by the Court, and the Court being fully advised;

Now, therefore, in conformity with oral ruling made at the time of such hearing, it is hereby Ordered that said motion be, and the same hereby is, denied.

Exception made by the defendant to such ruling and to the foregoing order is hereby noted and allowed.

Done in open court this 31st day of Oct., 1944.

JOHN C. BOWEN

U. S. District Judge

Approved as to form:

.....

Attorney for Plaintiffs

Presented by:

LANE SUMMERS

Of attorneys for Defendant

[Endorsed]: Filed Oct. 31, 1944. [34]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 718

OLUF B. HANNEY, HANS MIKELSEN, and
PAUL VOHL,

Plaintiffs,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA, a cor-
poration,

Defendant.

Be It Remembered: That on Wednesday, Octo-
ber 18, 1944, pursuant to Stipulation For Taking
Deposition hereto annexed, at the offices of Messrs.
McCutchen, Thomas, Matthew, Griffith & Greene,
in the Balfour Building, in the City and County of
San Francisco, State of California, personally ap-
peared before me, Frank L. Owen, a Notary Public
in and for the City and County of San Francisco,
State of California, duly commissioned and sworn
to administer oaths, et cetera, Henry Stakset, a
witness called on behalf of the defendant.

John J. Whelan, Esq., representing Messrs.
Derby, Sharp, Quinby & Tweedt, appeared as coun-
sel on behalf of the plaintiffs, and Russell A. Mac-
key, Esq., representing Messrs. McCutchen, Thomas,
Matthew, Griffiths & Greene, appeared as counsel
for defendant, and the said witness, having been
by me first duly cautioned and sworn to testify the

truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the counsel for the respective parties that the deposition of the [35] above-named witness may be taken at the offices of Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, in the Balfour Building, in the City and County of San Francisco, State of California, on Wednesday, October 18, 1944, before Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, and in shorthand by Kenneth G. Gagan.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all objections as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.)

HENRY STAKSET,

called as a witness on behalf of defendant, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Mackey: Q. Mr. Stakset, your name is Henry Stakset, is it? A. That's right.

Q. What is your business? A. Fishing.

Q. Fishing business? A. Yes.

Q. Where do you live?

A. I live in Tacoma.

Q. Tacoma, Washington? A. Yes.

Q. Are you about to go to sea?

A. Yes, I figure to go out tomorrow. [36]

Q. How long have you been in the fishing business? A. Oh, since I was sixteen.

Q. Have you lived up around the Puget Sound most of your life?

A. No. I lived there about, pretty near twenty-three years now.

Q. Do you remember selling some equipment belonging to a fishing boat to Oluf Hanney and Hans Mikelsen? A. Yes.

Q. When did you sell it to these men?

A. That was in 1941, the fall.

Q. The fall of 1941? A. Yes.

Q. At the time of the sale you made a list of the equipment that was being sold? A. Yes.

Mr. Mackey: Mr. Whelan, I haven't that list. You sent me over a copy of the list this morning,

(Deposition of Henry Stakset.)

and I wonder if I could use that for identification at the present time?

Mr. Whelan: Certainly.

Mr. Mackey: Q. Mr. Whelan has handed me a typewritten list, here, of equipment which apparently bears your signature on each page. I show it to you. Do you recognize your signature on those pages?

A. Yes, that is my signature, all right.

Q. On the second page, too? A. Yes.

Q. Is that the equipment that you sold these two men?

A. Yes. Do you want me to read it over?

Q. Yes. A. That is the list, yes.

Q. How much did you sell that equipment for to these two men, Hans Mikelsen and Oluf Hanney?

A. \$4000.

Q. Where was it at the time it was sold?

A. It was in a locker in the Fishermen's Dock, there, in Seattle.

Q. Is that the Salmon Bay Terminal?

A. Yes.

Q. You had stored it there, had you?

A. Yes.

Q. How long had it been in storage?

A. Oh, when they bought it [37] it was about six or seven months.

Q. That would be, then, in the spring of 1941 that you put it in storage? A. Yes.

Q. Why did you put it in storage?

(Deposition of Henry Stakset.)

A. Well, we didn't use it then, and it had to be taken care of, salt it down and hang up the lines so it will keep.

Q. Had you had it on a boat? A. Yes.

Q. You had a boat, and you took it off the boat? A. Yes.

Q. What was the name of your boat?

A. Midnight Sun.

Q. Did you own that boat?

A. I owned part of it, yes.

Q. How old was the boat; when was the boat built? A. In 1937.

Q. 1937? A. Yes.

Q. Had you been fishing with that boat from 1937 until the time you took it off and stored it?

A. Yes; every winter down here, every season down here.

Q. That is, down outside of San Francisco Bay?

A. Yes.

Q. What is the fishing season outside of San Francisco Bay?

A. Well, start here in August or September, and last for up to February of next year.

Q. What kind of fishing was that?

A. Sardine fishing.

Q. Did you fish during that season which began in September, 1937?

A. Not at the beginning. The boat was not quite ready and we start in the later part of September or first of October.

Q. Of 1937? A. Yes.

(Deposition of Henry Stakset.)

Q. At the end of the season, in February, 1938, you went back to Tacoma? A. Yes.

Q. Then did you fish in the season which began in September of 1938? A. Yes.

Q. Then returned to Tacoma in February of 1939? A. Yes.

Q. Did you fish in the season beginning September, 1939?

A. Yes, [38] not at the beginning, probably the later part of September.

Q. The latter part of September? A. Yes.

Q. And then went back in February of 1940?

A. Yes.

Q. Did you fish in the season beginning in September, 1940? A. Yes.

Q. 1940? A. 1940, yes.

Q. Did you go back to Tacoma in, say, February, 1941? A. Yes.

Q. That is when you put this gear that was sold in storage? A. Yes.

Q. Did you fish in 1941? A. No.

Q. From this boat? A. No.

Q. What happened to your boat?

A. The Government took it; sold it to the Government.

Q. The Government requisitioned your boat, did it? A. Well, it took it.

Q. What did you do with your boat between these fishing seasons that you described?

A. Chartered it out in the summer time.

Q. Chartered it out? A. Yes.

(Deposition of Henry Stakset.)

Q. Did you charter it out each summer?

A. I don't remember. I chartered them out two summers.

Q. Two summers?

A. Yes; I remember two summers.

Q. Do you remember where your boat was built?

A. At Tacoma Boatbuilding Company, Tacoma.

Q. The boat was delivered to you about August of 1937, was it?

A. Yes, the later part of August.

Q. Did you outfit the boat for fishing that season, yourself? A. Yes.

Q. When you first outfitted the boat, did you have equipment on the boat substantially what is shown here on this list?

A. Well, just about the same, yes.

Q. Just about the same?

A. Just about the same, yes, a little [39] more later on, I guess.

Q. A little more later on? A. Yes.

Q. I will draw your attention to this entry of 175 Montara bags and rubber; did you have those on board the first season, 1937?

A. No, not the full amount there.

Q. You had some? A. Yes.

Q. When did you get the rest of the bags?

A. I don't know; in 1938 and 1939.

Q. 1938 and '39? A. Yes.

Q. What are those bags made of?

A. Well, the inside is rubber and outside is covered with canvas.

(Deposition of Henry Stakset.)

Q. What are they used for? A. Floats.

Q. Used for floats? A. Yes.

Q. Do they help with the corks? A. Yes.

Q. To keep the seine afloat? A. Yes.

Q. From year to year you replenished those items, that equipment, from time to time?

A. Yes.

Q. What I am getting at is, the first year you had substantially the same equipment on board as is shown by that list, with the exception of the Montara bags? A. Yes.

Q. The Montara bags, you got some more, some additional ones, more than you had the first year, and you got those in 1938 and 1939? A. Yes.

Q. Were there any other things that you added subsequent to 1937 besides the Montara bags; I mean additional equipment that was just not replacements?

A. Well, replaced it, I put a little more—got the seine a little deeper, a little bit longer.

Q. And how much additional seine do you think you put on?

A. About, probably 20 percent.

Q. Probably 20 percent. Each year you went out fishing and before you went out and during the season you would buy replacements as they were necessary, would you? A. Yes. [40]

Q. Where did you make those purchases in 1937?

A. I bought most of the seine and corks and leads from Lindgren.

(Deposition of Henry Stakset.)

Q. Was that up in Seattle?

A. In Seattle, yes.

Q. Was the seine of American manufacture that you bought from Lindgren?

A. No, it was Japanese web.

Q. Japanese web? A. Yes.

Q. Is that as good as American web?

A. No, it is not as good as American web.

Q. Where did you buy the other stuff that you outfitted your boat with?

A. Later on I bought from Pacific Marine, Norby Supply Company, and Seattle Ship Supply Company, in Seattle.

Q. All those concerns are in Seattle?

A. Yes.

Q. Did you buy from those concerns the first year, in 1937?

A. I might have bought a little.

Q. Most of the stuff you bought the first year from Lindgren? A. Yes.

Q. The following years, as you needed replacements you bought from these other concerns up there? A. Yes.

Q. When you are down in San Francisco during the fishing season, when you were down here, did you buy anything in San Francisco?

A. Yes, I bought from Cincotta Bros.

Q. The stuff you bought from Cincotta Bros. was replacement, and so on? A. Yes.

Q. How much did the original outfit cost; I don't mean the boat, I mean the original outfit of seines,

(Deposition of Henry Stakset.)

and corks, and leads, and gear that is comparable to this that is on the list, here.

A. Well, I cannot say exactly, but the first year it cost around eight thousand, I guess.

Q. About eight thousand? A. Yes.

Q. You much did your boat cost, do you remember? Or, how much did your total investment amount to? A. About \$43,000. [41]

Q. \$43,000. A. Yes.

Q. How much did your boat cost?

A. I believe it was around \$36,000.

Q. \$36,000? A. Or \$35,000.

Q. \$35,000 or \$36,000? A. Yes.

Q. So your seines and nets and your corks and the rest of the equipment cost in the neighborhood of seven or eight thousand dollars? A. Yes.

Q. You used this boat and its equipment every season from 1937 to 1940, inclusive?

A. Yes, that's right.

Q. Did you make any large purchases of equipment after the original season of 1937?

A. Well, the Japanese web wasn't very good. In 1938 and 1939 I bought quite a bit replacements.

Q. Of netting? A. Netting, yes.

Q. You would not buy it all in one year, though?

A. No.

Q. You bought some in 1937 and some in 1938?

A. 1938 and 1939.

Q. 1939 and 1939, and the last purchases you made in the way of replacements were during the season of the fall of 1940? A. Yes.

(Deposition of Henry Stakset.)

Q. When you store this equipment what means are used to preserve it during storage?

A. Well, the netting is salted down, use about eight or nine tons of salt on the webbing; the lines and corks we hang up to dry.

Q. Do you salt it down with a salt brine?

A. No.

Q. I mean the webbing.

A. No. Haul it through a salt brine.

Q. Salt brine?

A. Cover it with salt, you can't see the webbing.

Q. How long do you think the netting will keep salted down that way?

A. Well, I haven't tried, but in one year I don't think it would do any damage for one year.

Q. That depends on whether or not it is covered with salt and brine? A. Yes. [42]

Q. If you have dry spots in it, what happens then?

A. Well, probably it gets hard, you see, and break out there where there is no salt.

Q. How long was the life of the nets that you were using from 1937 to 1940?

A. Well, all the time, if you take care of it, say about four or five years.

Q. Then it is gone? A. Yes.

Q. And you have to replace? A. Yes.

Q. I notice on this list some mattresses, were those part of the original purchase? A. Yes.

Q. That is the original year of 1937, mattresses?

A. Yes.

(Deposition of Henry Stakset.)

Q. Can you identify anything on that list that I have handed you and which you have identified yourself, can you pick out any of the things there that were new as late as 1940?

A. There is one item here, 350 fathoms.

Q. Of what?

A. $\frac{5}{8}$ galvanized purse wire.

Q. That was bought in 1940? A. Yes.

Q. Can you pick out anything else that was bought as late as 1940?

A. There is a strip of netting here, I don't know if it was bought in 1940, but it wasn't used.

Q. What is that?

A. That is 160 fathoms of $1\frac{3}{8}$, 9-thread 400 mesh.

Q. That is netting? A. Yes.

Q. That had never been used? A. No.

Q. Is that the item where on that line the pencil notation, "New" is after it?

A. Yes, I think so.

Q. Is that your handwriting, do you know?

A. I can't tell.

Q. Do you recognize any other item on that list that was new in 1940?

A. Well, I can't remember; there are so many things here that I can't remember.

Q. You don't recognize anything more on there that was new as [43] late as 1940?

A. No, not on that list, there.

Mr. Mackey: With your permission, I will offer this list in evidence so we can use it.

(Deposition of Henry Stakset.)

Mr. Whelan: All right.

(The list was marked Defendant's Stakset Exhibit 1.)

Mr. Mackey: How big was the Midnight Sun?

A. Over all, she was 78 feet long.

Q. Is that what you call one of the big boats in the fishing business?

A. Yes. Not the biggest, but one of the big ones.

Q. What percentage do you think of the big boats, that is, the size of the Midnight Sun, did the Government take when they requisitioned your boat, or about that time?

A. Well, I can't tell that.

Q. Do you think they took one-half of them?

A. No, not her equipment.

Q. Those that were in operation had already their equipment, didn't they?

A. Those that were in operation had, yes.

Q. And the gear that you sold, covered by this Stakset Exhibit 1, you didn't have any sale for it, except to somebody who had a new boat?

A. Well, I think we could sell it to the other boats, too; it was hard to get webbing at that time, and they were around asking for webs; it was hard to get webbing at that time.

Q. Could you sell all of it to one buyer or would you have to sell it piecemeal?

A. Well, they asked for pieces but we want to sell nothing except the whole thing.

(Deposition of Henry Stakset.)

Q. They were mainly interested in the netting?

A. Yes.

Q. In your opinion, what was the second-hand value of this equipment that you sold and that is represented by Stakset Exhibit 1, at the time of the sale?

A. Second-hand, it was worth about seven or eight thousand dollars second-hand.

Q. You sold it for \$4000. A. Yes.

Mr. Mackey: That is all. [44]

Cross Examination

Mr. Whelan: Q. Mr. Stakset, how old are you?

A. 37.

Q. Did I understand you to say you have been a fisherman since the time you were 16?

A. Yes.

Q. Have you ever owned any other fishing vessels besides the Midnight Sun?

A. Not in this country.

Q. Where did you own them?

A. In Norway.

Q. How many vessels did you own?

A. I had a part in two.

Q. Were they vessels the same size as the Midnight Sun? A. A little smaller.

Q. Were you the master and skipper of those?

A. No, I was not skipper there.

Q. How long did you own these other vessels?

A. The first one I had for two years.

Q. In what year was that?

A. That was in 1917 and 1918.

(Deposition of Henry Stakset.)

Q. 1917 and '18?

A. Yes. The other one I had in 1919 to 1923, when I left.

Q. You were familiar with the fishing gear and other equipment on these vessels? A. Yes.

Q. You saw the fishing gear and equipment on these vessels? A. Yes.

Q. What year was the fishing vessel *Midnight Sun* built? A. In 1937.

Q. You bought it the same year?

A. Yes. It was ready the later part of August or September.

Q. Did I understand you to say it was built at Tacoma Shipping Company?

A. Tacoma Boatbuilding Company.

Q. Did you have other partners?

A. Yes; we were nine other partners.

Q. What part of the year 1941 did the United States take the fishing vessel, the *Midnight Sun*?

A. That was in the spring.

Q. At the time the United States took your fishing vessel, [45] how much did it pay you and your partners?

Mr. Mackey: I object to that on the ground it is incompetent, irrelevant, and immaterial; the value of this equipment is what we are concerned with, not with the earnings.

Mr. Whelan: I still want to get the answer.

The Witness: Shall I answer?

Mr. Whelan: Yes.

The Witness: A. \$42,400, I think.

(Deposition of Henry Stakset.)

Mr. Whelan: Q. That amount did not cover the gear or other fishing equipment on the vessel, did it? A. No.

Mr. Mackey: Will you read that question and answer, please?

(Record read.)

Mr. Whelan: What I am trying to bring out is, I did not want confusion between the sale of the fishing vessel and the equipment. I want the record to show they were both distinct. That was my point.

Mr. Mackey: Yes.

Mr. Whelan: Q. Mr. Stakset, do you recall what part of the year 1941 you sold the gear of the vessel *Midnight Sun*?

A. It was in August or September.

Q. You sold it to Mr. Mikelsen and to Mr. Hanney? A. Yes.

Q. How much did you receive for the fishing gear at that time? A. \$4000.

Mr. Mackey: That is the gear on this list, here?

Mr. Whelan: That's right.

The Witness: A. Yes.

Mr. Whelan: Q. This gear had been stowed in locker 325 at the Salmon Bay Terminal at the port of Seattle?

A. Yes, that was the number.

Q. At the time of the sale you had a key to this locker? [46]

A. The watchman on the dock had a key in his office there.

(Deposition of Henry Stakset.)

Q. Did you have that key transferred over to Mr. Mikelsen?

A. Yes, I told him to get the key from the watchman when he needed it.

Q. You were very anxious to dispose of this fishing gear, weren't you?

Mr. Mackey: I object to that as incompetent, irrelevant, and immaterial. The sale was effected.

The Witness: Well, I couldn't get another boat. I figured it might get lost, it wouldn't do it any good laying that way for any length of time, and I would like to sell it, yes.

Q. You knew at that time, prior to the sale of this fishing boat that you would be unable to get another fishing boat, didn't you? A. Yes.

Q. You also knew you would be unable at the particular time, due to shortage of material, to build another fishing boat? A. Yes.

Q. How many discussions did you have with Mr. Mikelsen and Mr. Hanney prior to the sale of this fishing gear? A. I can't remember that.

Q. Was there one, or several conversations?

A. Several, I guess.

Q. At these discussions you knew that they wanted this particular gear that they were buying from you, that is, the gear on the list that we have already identified, and which has been admitted as Stakset Exhibit No. 1, for another fishing vessel which Mikelsen and Hanney were building in Tacoma, didn't you? A. Yes.

(Deposition of Henry Stakset.)

Q. The amount of \$4000 which you received from Mr. Mikelsen and his partner did not represent the true value of this fishing gear at the time you sold it in August, 1941? [47]

Mr. Mackey: I object to that on the ground the sale is the best evidence of the value.

Mr. Whelan: I think he testified before when you asked him the second-hand value——

Mr. Mackey: The sale represents the best evidence of value. I still object.

Mr. Whelan: Will you answer that question?

The Witness: No. It was worth more than we got for it.

Q. Well, it was due to the fact you couldn't——

A. I couldn't get a boat, so it was better to get some money for it or it probably would spoil.

Q. Now, referring to this cotton netting or webbing that is set forth on this list that you have already examined, Mr. Stakset, you say that this netting was bought at the time that you got the vessel in 1937; is that correct?

A. What did you say?

Mr. Whelan: Will you read the question, please?

(Question read)

A. No; very little of that netting on the list was bought in 1937.

Q. Was the original netting Japanese netting?

A. Yes, the first one was.

Q. Whom did you buy it from?

A. John Lindgren.

Q. How long did this netting last?

(Deposition of Henry Stakset.)

A. The first one?

Q. Yes, the first one.

A. We didn't use much of it the second year. We used probably only half if it the second year.

Q. But you had to start making replacements of that netting, didn't you? A. Yes.

Q. You made those replacements in 1938 and 1939? A. Yes.

Q. What was the price of the netting at that time, during 1938 and 1939 when you were buying this netting? [48]

A. It was around 80 cents a pound.

Q. From whom did you buy the new netting?

A. I bought most of it from Pacific Marine and then I bought some from Norby and some from Seattle Ship Supply.

Q. Did you buy any of it from Cincotta Bros.?

A. Yes, down here.

Q. This new webbing was replaced and repaired from time to time during 1938, 1939 and 1940, wasn't it? A. Yes.

Q. Did you use tar or other materials to keep this webbing in first class condition?

A. Yes, used tar, coal tar.

Q. How often was it tarred to keep it in good condition?

A. Put it on once when it was new.

Q. Did you put it on at regular periods of time when you finished fishing?

Mr. Mackey: I object to that on the ground he

(Deposition of Henry Stakset.)

put it on once when it was new. He has already testified that is when he put it on.

Mr. Whelan: I want to know if he put it on afterward, though.

Mr. Mackey: He said he put it on once when it was new.

The Witness: When it was new, yes, that's right.

Mr. Whelan: Q. After a year's period elapsed did you put any tar or any other material on this webbing to keep it in first class condition?

A. Tried once what they call net dip; that's about the same as coal tar.

Q. Did you put any tar on it during the year 1940 after your fishing season?

A. That I can't remember.

Q. Did you put it on prior to your fishing season?

A. I put once on; I think it was 1939 I put some on.

Q. But at all times from the time of the purchase in 1938 and 1939 you kept this webbing in first-class condition of repair or replacement?

A. Yes. [49]

Q. How much time did you put in repairing this webbing?

A. The whole crew was working on the gear; I can't say the hours.

Q. Did you put in several hours a day?

A. To hang the seine up took about ten or twelve days, twelve men.

(Deposition of Henry Stakset.)

Q. How many barrels of tar did you use each year on this webbing?

Mr. Mackey: I object to that on the ground he has already testified he only tarred it once and he used some sort of a dip one other year.

Mr. Whelan: Q. How many barrels of tar did you use the first time?

A. About ten or twelve barrels of tar for the full seine.

Q. Do you know, Mr. Stakset, what the price of webbing was in the year 1940?

Mr. Mackey: I object to that on the ground it is incompetent, irrelevant, and immaterial, and no proper foundation is shown.

Mr. Whelan: Q. On this list, Mr. Stakset, there is mention of a lifeboat; was this part of the original gear of the Midnight Sun? A. Yes.

Q. And between the years 1937 and 1939 did this lifeboat become battered?

A. Yes, it got smashed up.

Q. Did you fix this lifeboat by putting in new planks and new sides? A. Yes.

Q. Did you paint it at that time?

A. Well, we put linseed oil on it.

Q. Was the lifeboat kept in good condition?

A. Yes, it was just as good as new.

Q. Did you put linseed oil on it each year after that? A. Yes, every year. [50]

Q. So in 1941, August, at the time you sold the fishing gear and other equipment to Mikelsen, this lifeboat was in first-class condition, wasn't it?

(Deposition of Henry Stakset.)

A. Yes.

Q. Mr. Stakset, I believe you have testified that several items on this list, including 350 fathoms of 5/8 galvanized purse wire was brand new; is that correct?

A. That is correct.

Q. Is it also correct that that wire had never been used?

A. That is correct.

Q. And you have also testified that 160 fathoms of 1-3/8 9-thread netting was also brand new, is that correct?

A. That is correct.

Mr. Mackey: For identification, may we have it indicated that that is the fourth item from the end of that list, Stakset Exhibit 1, fourth from the end on the last page, the one that has "new" marked after it?

Mr. Whelan: Yes, that's right.

Q. There is also listed on these two sheets which have been identified and marked as Stakset Exhibit No. 1 Manila rope; isn't it correct that this manila rope was brand new and only had been in the water a few times?

Mr. Mackey: Just a minute. What item are you referring to?

Mr. Whelan: I am referring to a great deal of rope on these sheets, there are quite a few.

Mr. Mackey: All of it?

Mr. Whelan: Yes .

Mr. Mackey: All of the Manila rope?

The Witness: A. Well, most of it was new, yes, but not all of it.

Mr. Whelan: Q. Not all of it? A. No.

(Deposition of Henry Stakset.)

Q. Manila rope was very hard to obtain in 1941, wasn't it? A. Yes, it was hard to get. [51]

Q. There is also listed here one large purse drum and one small purse drum. When were these bought?

A. When I bought them new?

Q. When you bought them new. Were they replaced at any time? A. No.

Q. Were they kept in first-class condition?

A. Yes. They are wire, they last for years.

Q. Did you paint them?

A. Yes, paint them every year.

Q. Every year. There is also listed on this list anchor shackles. These were bought at the same time the vessel was built?

A. I can't say that, I don't remember that.

Q. Do you know when they were bought?

A. No, I don't remember that.

Q. At the head of this list is mentioned some 6500 6-inch Sel. Corks. Where were these bought?

A. Bought most of them the first year from Lindgren.

Q. Did you replace them? A. Yes.

Q. How many were replaced?

A. That I can't tell. When they broke we replaced them.

Q. You kept these corks in first class condition?

A. Yes; we dried them every year.

Mr. Mackey: Q. Dried them every year?

A. Yes.

(Deposition of Henry Stakset.)

Mr. Whelan: Q. Cork was unobtainable in 1941, wasn't it?

Mr. Mackey: I object to that on the ground no proper foundation is laid for it.

Mr. Whelan: Q. In 1937, when you purchased these corks, did you have any trouble buying them?

A. 1937?

Q. 1937. A. They were hard to get.

Q. It was hard to get in 1937? A. Yes.

Q. The same condition existed in 1938 and 1939?

A. Yes. [52]

Q. The same condition in 1940 and 1941?

A. Yes.

Q. These corks were in first-class condition, though, at the time of the sale to Mikelsen in August, 1941?

A. Yes, they were as good as you could get them. They had been used.

Q. There is mention on this list, Mr. Stakset, of wood blocks. Were they part of the original equipment of the vessel?

A. Most of them; broke probably a couple of them.

Q. And replaced them from time to time, is that correct? A. Yes.

Q. Do you know the last time you replaced them?

A. No. One broke down there, I can't remember the year.

Q. Do you know if it was 1939 or 1940?

A. It was 1939.

(Deposition of Henry Stakset.)

Q. When you sold the fishing gear and equipment to Mikelsen and his partner, you and your partners received \$4000? A. Yes.

Q. That is correct, isn't it?

A. That is correct.

Q. You are still familiar with the value of fishing equipment, aren't you? A. Yes.

Q. Where are you now working, Mr. Stakset?

A. My own boat, the North Sea.

Q. You are master of that vessel?

A. Yes.

Q. How large a vessel is that?

A. 63-1/2 feet.

Q. Since August, 1941, have you been working on fishing vessels? A. Yes.

Q. You have handled the fishing gear and other equipment on these various fishing boats?

A. Yes.

Q. Have you done any repairs on these fishing gear and equipment on these other vessels?

A. Yes.

Q. Have you replaced any equipment and fishing gear on these vessels?

A. On my own boat I replaced the gear.

Q. Do you know in October, 1944, the value of fishing gear and equipment? A. Yes. [53]

Q. You knew in August, 1941, the value of your fishing gear, didn't you? A. Yes.

Q. What was the value of your fishing gear in February, 1942, if you know?

(Deposition of Henry Stakset.)

Mr. Mackey: I object to that on the ground the proper foundation has not been laid; also the question calls for evidence that is incompetent, irrelevant and immaterial.

The Witness: New gear will cost——

Mr. Mackey: I object to any answer as to the cost of new gear. It is admitted the gear was not new.

Mr. Whelan: I am not asking him about new gear. I want to know if he knows what the value of his fishing gear was in February, 1942.

The Witness: February, 1942. In February, 1942——

Mr. Whelan: Pardon me. Before you answer, Mr. Stakset, I will say he has testified that he knows the value of fishing gear as of today; he testified he knew the value of his fishing gear in August, 1941, I want to know if he knew the value of his fishing gear in February, 1942.

Mr. Mackey: That is not the question. You asked him what was the value.

Mr. Whelan: Will you read the question, please?
(Question read by the reporter)

Mr. Mackey: If that is the question I still object that the proper foundation has not been laid. The witness has not qualified, but I want to expressly object to any testimony as to the cost new which this witness started to say.

Mr. Whelan: Q. I want to know, Mr. Stakset, if you knew the value of fishing gear in February, 1942. A. Yes.

(Deposition of Henry Stakset.)

Q. You knew the value of your fishing gear in February, 1942, isn't that correct? A. Yes.

[54]

Q. What was the value of your fishing gear in February, 1942?

Mr. Mackey: I still object on the ground it is too general and the proper foundation has not been laid.

The Witness: A. About nine or ten thousand dollars.

Mr. Whelan: Q. Mr. Stakset, you testified that you used your boat from 1937 to 1940, inclusive.

A. Correct.

Q. During the years 1938 and 1939 you made large purchases of webbing; isn't that correct?

A. Yes, that is correct.

Mr. Mackey: I object and move to strike out the answer. He said he made purchases.

Mr. Whelan: Q. Did you make large purchases of webbing in the years 1938 and 1939?

A. Yes, quite a bit in 1938 and 1939.

Q. 1940 was the last replacement that you made; is that correct? A. That is correct.

Q. You have also testified that your original outfit cost about \$8000; is that correct?

Mr. Mackey: He said seven to eight thousand.

Mr. Whelan: Q. Seven to eight thousand dollars? A. The fishing gear, yes.

Q. Had the price of fishing gear gone up from the time you first made your purchase of this gear in 1937 to 1941?

(Deposition of Henry Stakset.)

Mr. Mackey: I object to that question on the ground the proper foundation has not been laid, and it is not proper cross-examination. If you want to ask that particular question of him as an expert you will have to make him your own witness.

Mr. Whelan: Q. What is the life of this netting or webbing?

A. Well, that all depends on how it is taken care of.

Q. If it is taken very good care of?

A. It will last four or five years.

Q. You tarred this webbing several times during the last — [55]

Mr. Mackey: Just a moment. Not several times. I object to your putting words into the testimony. He said he tarred it once when he first started, and dipped it once more.

A. That's right.

Mr. Whelan: Q. You salted the webbing down, is that correct? A. Correct.

Q. What year was that done?

A. We salted every year. The last time I came in we salted it again.

Q. Where was that, in Tacoma?

A. In Seattle.

Q. That was in the spring, February of 1941; is that correct? A. That is correct.

Q. Did I understand you to say, Mr. Stakset, that you chartered your boat out during the summer? A. In the summer time.

(Deposition of Henry Stakset.)

Q. How long did that charter generally run?

A. Oh, from four to five months.

Q. Did you go over and repair your equipment after the vessel had been chartered out?

A. I repaired the vessel, yes.

Q. What replacements did you buy from Cincotta Brothers here in San Francisco?

A. I bought webbing and rope.

Q. You bought webbing and rope?

A. Yes.

Q. Anything else?

A. I can't remember exactly.

Q. Did you buy your wood blocks from him?

A. One or two.

Q. Did you buy any of the rubber buoys?

A. Might have bought big round ones, I think we got them from Cincotta.

Q. Do you know when these were bought?

A. No, I don't remember; 1938, I think.

Q. You have testified as to bags of rubber, I believe it is these Montara bags, 175, which were bought some time in 1938 or 1939.

Mr. Mackey: No; part in 1937 and the rest in 1938, he said.

Mr. Whelan: 1938. [56]

Q. Did you ever replace any of these bags?

A. A few of them got busted.

Q. Do you know what it cost you to replace them?

A. No; \$5 apiece, I think. I believe so, I am not sure.

(Deposition of Henry Stakset.)

Mr. Whelan: I have no more questions.

Redirect Examination

Mr. Mackey: Q. Mr. Stakset, I have here a list of materials on the letterhead of Cincotta Brothers, dated October 13, 1944, and identified at the top as "Purchases made by the M/S Midnight Sun during the year 1940. Will you look at that list?

Mr. Whelan: I am going to object to that on the ground it is too remote.

Mr. Mackey: Q. Will you look at that list and see if that will refresh your recollection as to the purchases that you made from Cincotta Brothers in 1940?

A. That is pretty hard to remember.

Q. Do you know Mr. Ernst down there at Cincotta Brothers? A. The timekeeper?

Q. Yes. A. Yes.

Q. You saw that list down there yesterday when we were talking it over with—you and I with Mr. Ernst? A. Yes.

Q. Will that refresh your recollection as to the purchases that you made down at that place in 1940?

A. I cannot remember that.

Q. Would you look over that last and see if you remember any purchases that you made at Cincotta's that is not on that list; I mean purchases made in 1940.

A. I can't remember all those small things.

Mr. Whelan: May I see that?

Mr. Mackey: Yes, certainly. [57]

(Deposition of Henry Stakset.)

Q. Your purchases from Cincotta Brothers were only things that you happened to find that you would need during the fishing season after you got down here, weren't they? A. Yes.

Q. Will you look at that list and see if that fairly represents about the type of thing and the amount of purchases you would make from Cincotta Brothers in a season?

Mr. Whelan: Objection. The witness has testified he can't remember.

The Witness: I can't tell exactly.

Mr. Mackey: Q. I am trying to get you to tell me whether that fairly represents about the type of thing that you would purchase from Cincotta Brothers during the season down here

A. Well——

Q. I don't mean to say that you have to purchase each one of those items, but does that fairly represent what you purchased?

A. Some years may buy more than others; if you happen to tear a seine or anything you buy more than in other years. There are lots of small things there.

Q. Well, you bought lots of small things of that sort, didn't you, from Cincotta Brothers from time to time?

A. When we need them we buy them, yes.

Q. Doesn't that represent about the type of thing you would buy from them?

A. Well, it must be. I can't remember all those things there.

(Deposition of Henry Stakset.)

Q. Tell me whether that is about the type of thing that you would go in there and buy.

A. Well, that is the type of thing, but some years you buy quite a bit.

Q. I appreciate that. I wouldn't try to get you to say that exactly represents what you bought, but is that about the kind of thing, the kind of purchase that you would normally make down there?

A. Well, some of it, yes. [58]

Q. Well, is there anything on there that you would not normally buy?

A. Well, when you need it you buy it. I can't tell what is——

Q. Well, can you refresh yourself on these items of September 25 1940, under that group, totaling \$3.46?

A. Yes.

Q. You would sometimes buy that kind of thing at Cincotta Brothers during the season?

A. Yes.

Q. Then for September 29, 1940, I see items of marine glue, patches, tape, a 6-inch purse block, and some galvanized screws and boat nails, totaling \$9.01; you would normally buy that kind of thing?

A. Yes.

Q. Wouldn't you, when you came down here?

A. Yes.

Q. The same type of thing occurred on September 1st, October 1st, rather, totaling \$6.32; that is about the type of thing?

A. Yes.

Q. Some flashlight batteries and Manila rope on October 21st, totaling \$7.25. October 24th I see

(Deposition of Henry Stakset.)

16 pounds of 3-1/2 inch 3-strand bolt rope, 69 pounds of 54 by 1-1/2 by 200 netting, 58 cents a pound, total for that day being \$47.38. That is a fairly large purchase for that day.

A. Yes. That is a brailer.

Q. Yes that is a brailer. On October 28th, diaphragm pump washer, \$2.22. This, generally, represents the kind of thing you would be buying there?

A. Yes, small things.

Q. And I see here on November 11 you purchased 149 pounds of 16-fathoms 15-thread 1-3/8 by 400 netting 6400 mesh.

A. Yes.

Q. 74 cents a pound; \$136.15 being the purchase on that day. Does that fairly represent about the kind of things you would be buying?

A. Yes, sir.

Q. I call your attention to the fact that the total for the 1940 purchases, including January of that year, was \$440. Is that about what it would run?

A. I can't remember. [59]

Mr. Whelan: May I see that list?

Mr. Mackey: I offer that list in evidence, not as proof of actual purchases made, but in connection with this witness' testimony as to the general type of things that he was buying at Cincotta Brothers.

Mr. Whelan: I object to the introduction of this in evidence due to the fact the witness has testified he cannot remember anything with regard to that list; further, on the ground it is too remote from the time of the sale.

(Deposition of Henry Stakset.)

Mr. Mackey: I ask that it nevertheless be marked as an exhibit.

(The document was marked Defendant's Stakset Exhibit 2.)

Recross Examination

Mr. Whelan: Q. Mr. Stakset, when you start out on a fishing trip you usually start from Tacoma?

A. Seattle.

Q. At that time you usually make all the purchases and replacements of equipment before you start out? A. Yes.

Q. Whom do you usually buy your equipment from at that time?

A. Oh, the stores up in Seattle, there.

Q. Would that be the Pacific Marine Supply Company? A. Yes.

Q. Norby Supply Company?

A. Yes, and Seattle Ship Supply.

Q. When you go into Cincotta Brothers that is just for small things; isn't that right?

A. That is when you are fishing.

Q. You are just going in and making purchases of what you actually need; isn't that correct?

A. That is correct.

Q. And all the equipment that you need, including netting, has already been purchased before you start out on your fishing trip? A. Yes.

Q. So if you make any purchases of netting from Cincotta Brothers it is either for the purpose of repairs or for replacement at [60] that time between fishing trips into San Francisco and then out again?

(Deposition of Henry Stakset.)

A. That is correct.

Mr. Whelan: That is all.

Further Redirect Examination

Mr. Mackey: Q. The price that you paid for netting varied according to the number of threads in the netting, and the mesh, didn't it?

A. Yes.

Q. So you cannot say that all netting is so much a pound? A. No.

Q. I believe you testified a little while ago this netting was so much a pound, but I don't know what netting you had in mind; I don't know how much you said——

A. It all depends what year it was.

Q. And also on the netting?

A. The netting, yes.

Mr. Whelan: I think he testified that in 1938, at the time he was making his purchase of netting for replacement, that he paid 80 cents per pound.

Mr. Mackey: Q. What netting did you have in mind?

A. That was the netting for the seine, 1-3/8 inches.

Q. How many pounds?

A. Just a few cents difference, I think.

Q. What thread netting did you have in mind at 80 cents? A. 9-thread.

Q. 1-3/8 inches. A. Yes.

Q. Is that the 400 mesh? A. Yes.

Q. Now, there is one item that I overlooked asking you about, and I don't understand it. I see on

(Deposition of Henry Stakset.)

this list, Stakset Exhibit No. 1, some pen boards. It is the seventh item from the bottom on the first page of his Stakset Exhibit No. 1. What are your pen boards?

A. We use pen boards in the hold to keep the fish from sliding, and sometimes I guess you would call it [61] drain boards; that is to keep the fish from not going over the side.

Q. What are they, just planks?

A. Yes, planks.

Q. What are the sizes of the planks?

A. Well, about 2-1/4 by 12.

Q. 2-1/4 by 12 inches; how long?

A. Well, that is according to the length of the hold in the boat.

Q. Those pen boards used in the hold run fore-and-aft on your boat? A. Yes.

Q. They divide the hold in half?

A. Yes.

Q. How long was your hold?

A. About 38 feet.

Q. 38 feet? A. Yes.

Q. Would your pen boards be that long, or would you have to use two or three boards?

A. Have to use two or three.

Q. Two or three lengths.

A. And extensions between.

Q. Do you think these pen boards would be 12 feet long? A. Some of them, yes.

Q. Some are purchased like that?

A. Yes.

(Deposition of Henry Stakset.)

Q. Any of them longer than that?

A. No, not longer.

Q. How high were the pen boards in the middle of the ship?

A. About seven or eight feet.

Q. So what that was was 2 by 12 planks?

A. Yes.

Q. Is that rough surface?

A. No, that is planed and painted.

Q. Planed and painted? A. Yes.

Q. And 2 by 12 planks laid on edge so as to go up seven or eight feet, and so as to go the length of a hold, about 38 feet? A. Yes.

Q. Now, would you call those pen boards or——

A. Well, we call them deck planks, too; sometimes call them pen boards, and sometimes call them deck planks. [62]

Q. The same kind of boards.

A. We had 2-3/4 inches thick by 12.

Q. 2-3/4 by 12? A. Yes.

Q. You use those along the railing on a ship?

A. Yes.

Q. About how many of those would you have on deck?

A. We had four lengthwise and about six cross-wise.

Q. Those would be 2-1/4 inches thick, 12 inches wide, and about 12 feet long?

A. Well, the boat was 20 feet across; say 16 feet lengthways.

(Deposition of Henry Stakset.)

Q. I am trying to get about how many boards there would be 12 feet long; about how many boards would there be if they are on the boat 12 feet long?

A. I would have to figure that out. About eight or ten boards, I guess, on the deck.

Q. What were these, fir boards?

A. Yes.

Q. Where is Mr. Hanney now, do you know?

A. He is in Monterey.

Q. Have you seen him since you have been down here?

A. Yes.

Q. Where is Mr. Mikelsen?

A. He is in San Francisco, here.

Q. Is he with you now on the same boat?

A. No, he is fishing on his own boat.

Q. Have you seen him?

A. Yes, I saw him once.

Q. Was that Mr. Mikelsen down there at Cincotta's the other day when I was down there?

A. I saw him the same day, but I don't know if he was there.

Q. How long have you known him?

A. Oh, I know him since 1937, I think.

Q. I called with you about a month ago, didn't I?

A. Yes.

Q. Then I talked with you again yesterday?

A. Yes.

Q. You have talked with Mr. Whelan here about this case, haven't you?

A. Yes. [63]

Q. That was yesterday?

A. Yes.

(Deposition of Henry Stakset.)

Q. When did you come in to San Francisco this last trip? A. It was Friday we came here.

Q. When did you talk to Mr. Whelan?

A. That was yesterday morning.

Q. You did not call me, though, did you?

A. No; I was so busy I don't know who to call first.

Mr. Mackey: That's all. [64]

State of California,

City and County of San Francisco—ss.

I certify that, in pursuance of Stipulation for taking Deposition hereto annexed, on Wednesday, October 18, 1944, before me, Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. McCutchen, Thomas, Matthew, Griffith & Greene, in the Balfour Building, in the City and County of San Francisco, State of California, personally appeared Henry Stakset, a witness called on behalf of the defendant in the cause entitled in the caption hereof: and John J. Whelan, Esq., representing Messrs. Derby, Sharp, Quinby & Tweedt, appeared as counsel on behalf of the plaintiffs, and Russell A. Mackey, Esq., representing Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, appeared as counsel for defendant; and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and

(Deposition of Henry Stakset.)

said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Kenneth G. Gagan, and thereafter reduced to type-writing; and I further certify that by stipulation of the proctors for the respective parties the reading over of the deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of mailing the same with my own hands to the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, the court for which the same was taken.

(Introduced during the taking of said deposition, referred to and specified therein, and annexed hereto are Defendant's [65] Stakset Exhibits 1 and 2.)

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office aforesaid this 21st day of October, 1944.

[Seal] FRANK L. OWEN

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 26, 1944.

[Endorsed]: Published Oct. 31, 1944. [66]

(Deposition of Henry Stakset.)

DEFENDANT'S EXHIBIT No. 1

6500	6" Sel. Corks
260 fthm	3" —4 strand Bolt Rope
65	4" Brass Rings
200 fthm	2 $\frac{1}{4}$ —4 Strand Purse Rope
175	Montara Bags and Rubber
14	C.J.H. 16" Rubber Bouys
40 fthm	3 $\frac{1}{2}$ " 4 strand Bolt Rope
20	3" Galv. Rings
120 fthm	3 $\frac{1}{2}$ Manilla rope
1	Strip 300 fthoms 1 $\frac{3}{8}$ -21 th 20 M.D. Cotton netting
1	Strip 300 fthoms 1 $\frac{3}{8}$ 12th 400 M.D. Cotton netting
4	Strip 300 fthoms 1 $\frac{3}{8}$ 9th 400 M.D. Cotton netting
1	Strip 300 fthoms 54th 6" Mesh Cotton netting
11	Sq. Bunk Mattresses
11	Vest Life Preserves
50 fthm	3 $\frac{3}{4}$ " Manila Rope
50 fthm	3 $\frac{1}{2}$ " Manila Rope
1	Large purse drum
1	Small purse drum
2	1" Galv. Screw Anchor shackles
2	$\frac{7}{8}$ " Galv. Screw Anchor shackles
2	7" 21-C Galv. Wood blocks
2	7" 22-C Galv. Wood blocks
50 fthm	2 $\frac{1}{2}$ Manila Rope
1	5 Gal. garbage can
80	$\frac{1}{2}$ x6 galv. purse rings

(Deposition of Henry Stakset.)

2	1" galv. Screw anchor shackle
2	1" galv. side hooks
1	8" Galv. Cleat
2	Bendir Hoops
4000	4 oz. $\frac{5}{8}$ " leads
175 fthm	4 $\frac{1}{2}$ " Manila rope
1	10'x10' No. 6 Brailer canvas
2	200 mesh x 200 mesh $1\frac{3}{8}$ " mesh 54th cotton netting
4	Brailer handles
10 tons	$\frac{3}{4}$ H. G. Salt
4	No. 2 scoop shovels
1	Oak davit
1	200 fthm 400 mesh $1\frac{3}{8}$ " meshes 6th cotton netting
1	Submarine light & cord
1	Strip 30 fthm $1\frac{3}{8}$ —18th 400 mesh D. cotton netting
1	Strip 30 fthm $1\frac{3}{8}$ —18th 400 mesh D. cotton netting [67]
1	Strip 30 fthm $1\frac{3}{8}$ —15th 400 mesh D. cotton netting
1	Life boat
2 pr.	10 ft. Ash oars
2 pr.	#3 galv oar locks
200 fthm	4 $\frac{1}{2}$ manila rope
4	1 $\frac{1}{2}$ " Galv. open turnbuckles J. H.
350 fthm	$\frac{5}{8}$ " Galv. purse wire
4	15 fthm 5" Manila rope
	Pan boards
1	12" Galv. 22-C Com Dble wood blocks
2	12" Galv. 21-C Com single wood blocks

(Deposition of Henry Stakset.)

2	10" Galv. 22-C Com Dble wood blocks
2	10" Galv. 21-C Com single wood blocks
1	10" Galv. Block
50 fthm	5/8" galv. 6/24 purse wire
40 ft.	2" Rubber Deck Hose
1	2" Brass hose nozzle
4	Deck Scrubs and handle
2	12 qt heavy galv buckets
1	strip 160 fthm 13/8 9th 400 M. D. Cotton netting new
2	Hand Made purse blocks
2	Unloading brailers
1	10" Cargo block

HENRY STAKSET [68]

DEFENDANT'S EXHIBIT No. 2

CINCOTTA BROTHERS

Marine Hardware

Fishing Supplies

169 Jefferson Street

Telephone PROspect 8977

San Francisco, California

October 13, 1944

Purchases made by the M/S Midnight Sun during the year 1940

Itemized January purchases not available, amounted to \$ 108.58

Sept. 25, 1940 Inv. #5788

1—1/8 to 1/4 brass reducer .....	.15
1—1/8 to el brass nipple .....	.11
2—7/8 galv. shackles 1.40 ea.....	2.80
1—1/4 female hose coupling .....	.30

3.36

Sales tax..... .10

3.46

(Deposition of Henry Stakset.)

Purchases made by the Midnight Sun in 1940—(Continued)

Sept. 29, 1940 Inv. #5684

1 dz. 2 x 14 galv. screws.....	.15
1 tube marine glue .....	.40
1 can tube patches .....	.25
1 friction tape .....	.30
1 6" galv. purse block	7.35
1 dz. 2½ x 14 galv. screws.....	.15
1# 31/2" boat nails .....	.15

8.75

Sales tax.....

.26

9.01

Oct. 1, 1940 Inv. #5808

1—3" galv. tee	3.40 ea. 40%	2.04
1—3 x cl. galv. nipple.....	.80 ea. 40%	.48
1—3" galv. cap	1.56 ea. 40%	.94
17½" 3" galv. pipe threaded.....		1.90
1—1 x 4 galv. machine bolt.....		.30
1—3 x cl galv. nipple.....	.80 ea. 40%	.48

6.14

Sales tax.....

.18

6.32

Oct. 15, 1940 Inv. #6605

1—1 x 3½ bolt35
---------------------	-----

Sales tax.....

.01

.36

Oct. 21, 1940 Inv. #6465

28#—3½" manila rope .23#	6.44
6—flashlight batteries .10 ea. ....	.60

7.04

Sales tax.....

.21

7.25

Oct. 24, 1940 Inv. #6632

16#—3½" - 3 strand bolt rope .29#.....	4.64
69#—54 x 1½ x 200 netting .58#.....	40.02

Sales tax.....

1.34

tanning 69# netting .02#.....

1.38

47.38

(Deposition of Henry Stakset.)

Purchases made by the Midnight Sun in 1940—(Continued)

Oct. 28, 1940 Inv. #8075

1—#3 diaphragm pump washer.....	2.15	
Sales tax.....	.07	2.22

Oct. 30, 1940 Inv. #8020

2 sets Hartman cutouts 1.50 ea.....	3.00
Sales tax.....	.06

1½ hrs. electrician 1.75 per hour.....	2.63	5.69
--	------	------

Oct. 30, 1940 Inv. #8136

3½# 7/16 manila rope .24#.....	.84
35# bluestone .08#	2.80

	3.64	
Sales tax.....	.11	3.75

Oct. 19, 1940 Inv. #6435

1 piece galv. tin 13" x 30".....	.65	
Sales tax.....	.02	.67

Nov. 1, 1940 Inv. #8356

8 yards cocoa matting 1.00 yd.....	8.00
8 hemmings .50 ea.	4.00
1 deck brush only .....	.50

	12.50	
Sales tax.....	.38	12.88

Nov. 6, 1940 Inv. #8385

35#—3½" manila rope .23#.....	8.05
159#—4" - 4 std. bolt rope .29#.....	46.11

	54.16	
Sales tax.....	1.63	55.79

(Deposition of Henry Stakset.)

Purchases made by the Midnight Sun in 1940—(Continued)
 November 11, 1940 Inv. #10581

149#—16 fathoms 15 thread $1\frac{3}{8}$ x400		
netting .74#	110.26	
$\frac{3}{4}$ barrel cold dip 26.00 barr.....	19.50	
	<hr/>	
	129.76	
Sales Tax	3.89	
Tarring	2.50	136.15
	<hr/>	

November 18, 1940 Inv. #10746

1—8" sounding lead .15 $\frac{1}{2}$ #.....	1.24	
1— $\frac{1}{2}$ x $3\frac{1}{2}$ machine bolt .....	.07	
1—Boatend connection	1.75	
	<hr/>	
	3.06	
Sales tax.....	.09	3.15
	<hr/>	

November 18, 1940 Inv. 10810

1—3 x cl galv. nipple .80 ea. 40%.....	.48	
Sales tax.....	.02	.50
	<hr/>	

November 20, 1940 Inv. 10820

2—foam charges 1.00 ea.....	2.00	
Sales tax.....	.06	2.06
	<hr/>	

November 26, 1940 Inv. 7537

39#— $3\frac{3}{4}$ " manila rope .23#.....	8.97	
1—14 foot ash oar .52 ft.....	7.28	
1—30" sea anchor	5.15	
	<hr/>	
	21.40	
Sales tax.....	.64	22.04
	<hr/>	

November 27, 1940 Inv. 8217

1—fuel oil regulator (Ingle range 116).....	2.75	
Sales tax.....	.08	2.83
	<hr/>	

December 5, 1940 Inv. 7787

1—Glover leaf grinding compound.....	.60	
Sales tax.....	.02	.62
	<hr/>	

(Deposition of Henry Stakset.)

Purchases made by the Midnight Sun in 1940—(Continued)

December 6, 1940 Inv. #7958

1—package Turco .....	.45	
Sales tax.....	.01	.46

December 6, 1940 Inv. #8503

3 flashlight batteries .10 ea.....	.30	
1 flashlight glove .....	.10	
1 3/16 galv. shackle .....	.28	
	.68	
Sales tax.....	.02	.70

December 23, 1940 Inv. #8710

14 ft. 1½" - belata belting and lacing.....	7.90	
Sales tax.....	.24	8.14

\$ 440.01

[Title of District Court and Cause.]

Be It Remembered, that the Deposition of Kenneth H. Wheelock, called as a witness on behalf of Plaintiffs, was taken on the 4th day of August, 1944, beginning at the hour of 2:30 o'clock p.m., at 990 Dexter Horton Building, Seattle, King County, Washington, pursuant to Notice and Subpoena Duces Tecum duly and regularly served, and Oral Stipulation between counsel, before W. J. Lauckhart, a Notary Public.

C. E. H. Maloy, Esq. appearing as counsel for and on behalf of Plaintiffs;

Matthew Stafford, Esq., (Of Hayden, Merritt, Summers & Stafford) appearing as counsel for and on behalf of the Defendant;

Whereupon, the witness being by the Notary first duly sworn, was then and there examined and testified as hereinafter set out, to-wit:

KENNETH H. WHEELOCK,

a witness called on behalf of the Plaintiffs, being first duly sworn, was examined and testified as follows: [73]

Direct Examination

By Mr. Maloy:

Q. Your name is Kenneth H. Wheelock?

A. Yes, sir.

Q. In August of 1941 and prior thereto, you were associated with Chester J. Chastek & Co., Insurance Building, Seattle?

A. That is correct.

Q. In what capacity were you associated with that concern at that time?

A. I was vice-president of the company.

Q. And what were your duties particularly as to managing the company and so forth?

A. I was in effect the Manager due to Mr. Chastek's absence on active duty with the Navy. I believe that I am correct that he was called into service in February of 1941.

Q. And you ever since have been connected with Chester J. Chastek & Co.—and its successor, what do you call it now?

A. Chastek & Wheelock, Inc.

Q. And you are still acting as such manager of that corporation?

A. Yes, sir.

(Deposition of Kenneth H. Wheelock.)

Q. In the late spring of 1941 you wrote some insurance, both a surety bond and a builder's risk policy, for Mr. Oluf B. Hanney and Mr. Peterson of the Marine View Boatbuilding Company of Tacoma? A. That is correct.

Q. And I believe under date of August 20, 1941, you wrote a builder's risk policy covering Hull No. 20 for those parties?

A. The effective date of the policy was August 20, 1941, to November 20, 1941.

Q. With whom did you have your dealings in connection with the writing of that policy known as the builder's risk [74] policy No. —

A. No. 44298.

Q. That is the original policy and the endorsement of the builder's risk policy, Form No. 50?

A. As amended.

Q. As amended; yes. A. January, 1939.

Q. With whom did you have your dealings?

A. My original contract you mean?

Q. Yes.

A. It was with Mr. Hanney through Attorney H. O. Landon.

Q. Herbert Landon? A. That is correct.

Q. He referred Mr. Hanney to you; is that the idea? Or did he refer you to Mr. Hanney?

A. He phoned me at the time that he was completing this contract for Mr. Hanney—

Mr. Stafford: Wait a minute. By "this contract", what do you mean, Mr. Wheelock?

A. The contract for the building of the boat

(Deposition of Kenneth H. Wheelock.)

between Mr. Hanney and the Marine View Boat-building Company.

Q. (By Mr. Maloy): They phoned you; all right.

A. At which time I went to his office and there I met Mr. Hanney for the first time.

Q. You met him at that time particularly pertaining to the surety bond?

A. For the purpose of discussing the furnishing of a performance bond.

Q. A surety bond.

A. A surety bond.

Q. Now then, later I presume when you discovered that [75] Mr. Peterson was going to build a boat for Mr. Hanney known as the Hull No. 20, that you solicited the Builder's risk insurance?

A. From Mr. Hanney.

Q. Yes; from Mr. Hanney?

A. Yes; that is correct.

Q. All right. Did you solicit from Mr. Peterson at all?

A. Yes. No; I will change that if I may. I talked with Mr. Peterson on perhaps three or four occasions. The business, however,—I am now referring to the builder's risk—

Q. Yes.

A. —was ordered and authorized by Mr. Hanney in accordance with the terms of his contract with Mr. Peterson.

Q. That he was to furnish it?

A. That he was to pay for it.

Q. That he was to pay for it. All right.

(Deposition of Kenneth H. Wheelock.)

Mr. Stafford: Do you have any objection, Mr. Maloy, if I ask the witness to identify that contract again? You mean the construction contract?

A. The construction contract between Mr. Peterson and Mr. Hanney.

Q. (By Mr. Maloy) Then your negotiations were with Mr. Hanney then concerning the supplying for Mr. Hanney and Mr. Peterson a builder's risk insurance policy? A. Yes, sir.

Q. And that culminated or resulted in you writing the policy that is involved in this lawsuit, builder's risk Form 50 as amended January, 1939?

A. That is correct.

Q. When did you actually write the policy?

A. Well, I couldn't give you the date that I actually wrote [76] the policy. I didn't write the policy as a matter of fact. The policy was written by the Company, in the Company office of the Franklin Fire Insurance Company.

Q. It was written there? A. Yes, sir.

Q. And then delivered to you?

A. And then delivered to me.

Q. And then you signed it on behalf of the Franklin Fire Insurance Company as its agent?

A. That is correct. At which time the correspondence will show that Mr. Hanney was notified by letter requesting that he furnish us with a correct address in order that we might mail the policy to him.

Q. Prior to the time that the policy was written by the Franklin Fire Insurance Company, had

(Deposition of Kenneth H. Wheelock.)

you had the policy in your possession that was to be written and which was finally delivered to Mr. Hanney?

A. Would you mind repeating that question?

Q. I will restate it. Before you actually wrote or signed the builder's risk policy here involved, had you the policy in your possession and had you discussed its terms with Mr. Hanney?

A. Well, I couldn't have had the policy in my possession before it was written.

Q. Did you have a form or a copy of the policy which you discussed with Mr. Hanney?

A. It is quite likely that I did have. I wouldn't say under oath that I did, but it is quite likely that I did have. There had been some discussion as to the coverage, particularly that pertaining to the engine.

Q. Well, let me ask you this. Before you delivered the policy [77] to Mr. Hanney, had you discussed with Mr. Hanney the terms of builder's risk Form No. 50 amended in January, 1939?

A. I am very positive that I had.

Q. Before the builder's risk policy was issued and delivered to Mr. Hanney did you have Mr. Hanney fill out any application for such insurance, written application?

A. Not that I recall, nor do I have any record of any such application. You are speaking now of builder's risk?

Q. Oh, yes. I am confining it to that.

(Deposition of Kenneth H. Wheelock.)

Before delivering the builder's risk insurance policy to him, you knew that Peterson was building the boat for him and that he was the owner.

A. That is correct.

Q. Now, did you make any inquiries of Mr. Hanney before you delivered the insurance, the builder's risk policy, to him, as to whether anybody else was interested with him in the boat?

A. No; I made no inquiries.

Q. Did he volunteer at any time to you before the builder's risk policy was delivered to you, that any other parties were or might be interested in the building of the boat?

A. I am of the opinion that any reference made to any other interested parties was some time after the issuance of the policy.

Q. Can you place the time when it was first referred to, Mr. Wheelock?

A. No, sir; I couldn't.

Q. Do you think it might have been about the time that the policy was first extended which would be on or about November 20, 1941? Does that refresh your recollection at all?

A. I wouldn't dare to say. [78]

Q. Well, the fact remains that some time after the issuance of the builder's risk policy in August, 1941, he did direct your attention to the fact that others were interested with him in the building of the boat?

A. Yes; merely to the extent that they were in-

(Deposition of Kenneth H. Wheelock.)

terested. In what manner I am not aware even today.

Q. Yes. Did he not tell you that Mr. Hans Mikelsen and Mr. Paul Vohl were interested with him in the building of the boat?

A. Well, may I put it this way? That there was mention made by him of the fact that there were other parties interested with him but at no time did he indicate to me that their interest in the construction of this boat necessitated any change in either the surety bond or the builder's risk policy.

Q. Yes. He did mention the fact, did he not, Mr. Wheelock, that Mr. Mikelsen and Mr. Vohl were interested with him in putting up the money for the construction of the boat?

A. Whatever their arrangements were, I do not know.

Q. But he did tell you that, did he not?

A. That is correct; at some time.

Q. He told you that at some time?

A. I know that it wasn't prior to the issuance of the policy. Else I would have gone into it further.

Q. Did you say it was some time in the late fall of 1941?

A. It could have been. It could have been in the late fall, Mr. Maloy, or it could have been in the early spring. I frankly could not recall.

Q. Did Mr. Hanney come to your office from time to time in regard to this policy or the extension of it?

A. He was in my office from time to time when he would get into town. I couldn't say how many

(Deposition of Kenneth H. Wheelock.)

times. [79]

Q. How are the extensions handled? After November 20th they were every thirty days. How were they handled? Did you just automatically renew it from time to time?

A. That is correct.

Q. That was the understanding, was it?

A. Yes.

Q. That you should renew it from time to time until the vessel was completed?

A. That is correct.

Q. And he should notify you when the engine was placed upon the ground or in the vessel?

A. Mr. Peterson was to notify me and I also had an arrangement with the Washington Iron Works so that there would be no slip-up that they would likewise notify me on the date of shipment.

Q. Now, when Mr. Hanney came to your office, do you remember an occasion in the fall of 1941, about November 20, when Mr. Mikelsen was with him?

A. One of those two gentlemen were with him. I think it was Mr. Mikelsen.

Q. A big husky blond fellow?

A. That's right.

Q. And do you recall of Mr. Mikelsen coming in another time later about a month or so, coming in in February of 1942, and paying \$75.00 an account of premium? Was that Mr. Mikelsen that came in and paid that at that time?

A. I recall that Mr. Mikelsen did come in and

(Deposition of Kenneth H. Wheelock.)

make one payment. I would not want to say which one it was.

Q. That was made in currency, was it not?

A. No; everything according to our records was by check.

Q. Then he gave you a \$75.00 check then, you think? [80]

A. We had one check. I don't know whether it was endorsed to us or not, but it was a Nordby Supply Company check.

Q. Was that the \$111.00, the first payment made on 8/20/41? A. No; it wasn't.

Q. That was paid in currency, was it not?

A. No, sir; that was paid according to my records all by check.

Q. You think one of those two checks, the \$111.00 or the \$75.00 check, was a Nordby Supply Company check and then endorsed by either Hanney or Mikelsen to you?

A. Yes; I think so. The payments were always made in order and promptly.

Q. I believe you stated a few moments ago, Mr. Wheelock, that you had discussed with Mr. Hanney the builder's risk policy Form No. 50 amended 1939. When was that?

A. Well, it was discussed at various times as any policy will be. It was discussed prior to the issuance of the policy and it was discussed following the delivery of the policy, right after the delivery of the policy, I should say, within a short space of time.

(Deposition of Kenneth H. Wheelock.)

Q. The endorsements placed on the policy covering the extensions were discussed with Mr. Hanney, or Mr. Mikelsen and Mr. Vohl also, were they?

A. I do not believe so except to the extent of making certain that they would be automatically extended even though they should be absent and there was a discussion relative to not covering the launching hazard. An endorsement had been issued—if I may refer to the dates? Is that permissible?

Q. Surely.

A. (Resuming) An endorsement was issued on December 23, 1941, extending the policy to cover launching and trial trips. That policy was cancelled—— [81]

Q. The endorsement you mean?

A. The endorsement; pardon me. That endorsement was cancelled without charge on February 25, 1942, granting a return premium of \$22.50 which was the charge for the original endorsement.

Q. And is that the same day that another endorsement was placed on or attached to the policy extending it from February 20th to March 20th—or 22nd, 1942? A. From February you say?

Q. Yes; from February to March?

A. That was the same day, February 25th.

Q. In other words, the endorsement covering the extension and extending the insurance from February 20, 1942, to March 22, 1942, substituted and took the place of the one that you are just speaking of; is that it?

(Deposition of Kenneth H. Wheelock.)

A. Yes; I believe that that is correct.

Q. Now, Mr. Wheelock, was there any discussion between you and Mr. Hanney when the insurance was taken out concerning Mr. Hanney and his associates purchasing tackle, apparel, appurtenances, materials, furniture, fixtures and so forth, which they were going to store in Seattle?

A. No; I don't have any recollection of any conversation of that nature. There was at one time a discussion as I recall it pertaining particularly to the engine. There were questions asked relative to the builder's risk policy at which time I endeavored to explain to them the policy contract and what a builder's risk policy constituted and what it was intended to cover.

Q. Did you read to them the policy?

A. I read to them one section of the policy.

Q. Which section of the policy did you read?

A. As I remember—and as I recall this was again primarily [82] in connection with the engine—I read them,—shall I read the section?

Q. Yes; you might read it.

A. This one right here.

Q. You might read it.

A. (Reading) "This insurance is also to cover all risks including fire while under construction and/or fitting out, including materials in buildings, work shops, yards and docks of the assured, or on quays, pontoons, craft, and all risk while in transit to and from the works and/or the vessel wherever she may be lying; also all risks of loss or dam-

(Deposition of Kenneth H. Wheelock.)

age through collapse of supports or ways from any cause whatever and all risks of launching and breakage of the ways.”

Now that was read for the purpose of endeavoring to show Mr. Hanney the coverage afforded by the Builder’s risk policy in connection with his contract for the building of the hull.

Q. Did you read to him at any time any other clause or provision of the policy for the purpose of enlightening him on what his coverage was?

A. Yes; there was another clause, if I can find it, in connection,—I believe the question was if the engine should be dropped while swinging from the dock to the hull.

Q. But only pertaining to the engine?

A. Yes.

Q. Well, did you read to him any other clauses than those two that you have sepecified?

A. No; not to my best knowledge, because, as I recall it,—see, this is quite a little while ago—and as I recall [83] it, those were the principal things in which he was interested and they tended to explain to him the nature of the coverage afforded.

Q. Now, was this explanation of these two clauses that you have referred to made after he had received the policy from you?

A. The question in connection with the dropping of the engine I am very sure was after he had received the policy.

Q. As I understand it, he didn’t receive the policy until some little time after it was actually

(Deposition of Kenneth H. Wheelock.)
signed and issued by the Franklin Fire Insurance Company?

A. That could have been possible because we had to await his mailing address.

Q. You didn't know exactly where he was or where to send it to him?

A. That's right. We sent a letter to him at the last address we had in Seattle although we believed at that time that he was in Alaska.

Q. Now, up to that time, though, up to the time that you made the explanation of the two clauses we have just referred to, you had not made any explanation to him of any other clause or provision in the policy further than to tell him that generally he was covered?

A. Not other than the general coverage afforded under the policy.

Q. Now did he tell you at any time at that time that Mr. Mikelsen and Mr. Vohl were interested with him in the bulding of the boat and in all the materials they were sending for the purpose of placing upon the boat?

A. Well, at some time he told me that he had these two other men [84] interested financially, but with no further explanation.

Q. In August while you were talking to him, August of 1941, when you were discussing the matters with him and prior to the issuance of the policy, did he make any reference to you that he was negotiating with a man named Henry Stakset in Tacoma relative to purchasing a large amount of equip-

(Deposition of Kenneth H. Wheelock.)

ment—seine nets and rope and block and tackle and other stuff of that kind, that he was going to use on this boat? A. No; never.

Q. You don't recall anything of that character?

A. No; I don't.

Q. Do you recall Mr. Hanney or Mr. Mikelsen or Mr. Vohl discussing that with you prior to the time that the policy was issued?

A. There was at no time any discussion pertaining to any nets or equipment of that nature.

Q. At any time with any of them?

A. Not with any of them.

Q. At any time during all the course of these renewals or anything of that kind?

A. That is correct. I have no knowledge of that.

Q. Then I presume consequently that you have no recollection either of their having discussed with you as to the fact that they were going to store that stuff here in the City of Seattle?

A. No; the only thing that I can recall in connection with any discussion concerning coverage outside of Tacoma was in connection with the material to be used in this hull, and: would it be covered, for example, if it was held over in transit somewhere prior to getting into the yard?

Q. And what did you tell them about that? [85]

A. And I told them that it was covered in transit according to the policy terms.

Q. I see. Now, I believe you have made a search for the correspondence which you had with Mr.

(Deposition of Kenneth H. Wheelock.)

Hanney? By the way, you kept this account in Mr. Hanney's name? A. In both names.

Q. In Mr. Hanney's and Mr. Peterson's names?

A. Yes.

Q. On your records with your correspondence with either Mr. Peterson or Mr. Hanney?

A. That is correct.

Q. You have had a search made for any and all correspondence that you had with either one of them? A. Yes, sir.

Q. Pertaining to this builder's risk policy?

A. Yes; we looked all this week and dug up everything that was there.

Q. I see. And this bundle of letters that you have here are the only ones that you can find concerning the matter?

A. That is correct, and I do not believe that I ever received any correspondence from Mr. Hanney at any time. It was generally by personal call when he was in the city.

Mr. Malloy: I see. Now will you mark these, Mr. Notary? I would like to have them marked all as one exhibit so we will have them accounted for.

(Whereupon a group of papers were attached together and by the Notary marked as Plaintiff's Exhibit "1" to this disposition)

Q. (By Mr. Maloy) I will hand you plaintiffs' exhibit 1 and ask you if this is all the correspondence that you as Chester J. Chastek and Co. or Chastek & Wheelock, Inc., have had with Mr. Hanney or Mr.

(Deposition of Kenneth H. Wheelock.)

Peterson concerning this builder's risk [86] policy that we are discussing?

A. This is everything that we have located in our files.

Mr. Maloy: I will offer this exhibit 1 in evidence as part of the deposition.

Mr. Stafford: Why do you offer it?

Mr. Maloy: Just for the purpose of showing the facts; with whom the parties were dealing and with whom he had his correspondence.

Mr. Stafford: (Examining proposed exhibit) I object immediately to the introduction in evidence at the time of taking this deposition to correspondence between Chastek and the Franklin Fire Insurance Company in connection with it, which correspondence is included here. I may be mistaken but I don't think the subpoena calls for that.

Mr. Maloy: If there is one of those letters, you may eliminate it.

Mr. Stafford: The very first letter is one from Chastek to the Franklin Fire Insurance Company.

Mr. Maloy: Eliminate any correspondence between Chastek and Co. and Franklin Fire Insurance Company.

The Witness: I brought everthing there was.

Mr. Maloy: I assumed that it was all between Hanney and you or you and Hanney—and Peterson.

Mr. Stafford: I have no objection to the others.

Mr. Maloy: All right. We will have it marked

(Deposition of Kenneth H. Wheelock.)

over again because the identifying mark was placed on this first letter which we are eliminating.

(Whereupon the group of letters constituting Exhibit 1 was remarked as Plaintiffs' Exhibit 1 for identification, eliminating the first letter of the group as heretofore marked.) [87]

Q. Now the ledger account of Chastek & Co. was kept in the name of Peterson and Hanney?

A. (Reading) "Peter Peterson doing business as Marine View Boatbuilding Company, Tacoma, Washington, and Oluf B. Hanney, owner, Seattle, Washington."

Q. That's right. As a matter of fact, the purpose of the builder's risk policy was to insure the builder and the owner, was it not?

A. That is correct, for the construction of the hull.

Q. As their interest might appear?

A. There were policies written in both names. The builder's risk policy, Franklin Fire Insurance Company policy No. 44298, was written in the name of both the builder and the owner.

Q. And the builder's risk policy also?

A. That is the builder's risk policy.

Q. Oh, is it? A. Yes, sir.

Q. And you are referring also to the rider in the form of a builder's risk Form No. 50, are you not?

A. Well, it constitutes the policy, is a part of the policy.

Q. Yes; written in the name of both; and the

(Deposition of Kenneth H. Wheelock.)

purpose of it was to cover the interest of Peterson, the builder, and the interest of the owner?

A. That is correct.

Q. Your daily report you are requested to bring in the subpoena is I take it the duplicate or copy of the Policy No. 44298, together with the attachment, the form builder's risk No. 50 amended, and the endorsements thereon?

A. That is correct.

Q. That is what makes up your daily report?

[88]

A. Yes, sir; that is our record and a copy of the builder's risk policy.

Mr. Maloy: That is all.

Mr. Stafford: Mr. Maloy, this exhibit that you had marked, maybe I didn't understand thoroughly but I didn't understand that you offered it in evidence.

Mr. Maloy: Yes; I offered it in evidence.

Mr. Stafford: Well, we started out here rather quickly and informally without any stipulation as to objections.

Mr. Maloy: You can object to it.

Mr. Stafford: What I would prefer to do in view of the number of papers constituting the exhibit, I would prefer to reserve my objection until the time of trial.

Mr. Maloy: That is all right. I have no objection to that.

Mr. Stafford: Is that all?

Mr. Maloy: Yes.

(Deposition of Kenneth H. Wheelock.)

Mr. Stafford: I have no questions.

(Conclusion)

(sgd) KENNETH H. WHEELOCK

Deposing Witness.

Subscribed and sworn to before me this 10th day of August, 1944.

[Seal] W. J. LAUCKHART

Notary Public in and for the State of Washington,
residing at Seattle. [89]

CERTIFICATE

State of Washington

County of King—ss.

I Hereby Certify, that the deposition of Kenneth H. Wheelock, a witness called on behalf of Plaintiffs, was taken on the 4th day of August, 1944, beginning at the hour of 2:30 p.m., at 990 Dexter Horton Building, Seattle, King County, Washington, pursuant to Notice, Subpoena duces tecum, and Oral Stipulation between counsel for a continuance from the date set in the Subpoena to this day, before me, W. J. Lauckhart, a Notary Public in and for the State of Washington, residing at Seattle.

That the said witness, being by me first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, and being examined, deposed and said as in the foregoing deposition set out.

That the taking of this deposition was begun on the 4th day of August, 1944, and was completed on the same day.

I certify that the examination of the witness comprising this deposition was by me personally recorded by stenograph notes from the witness and in his presence, and was thereafter reduced to type-writing under my personal direction.

I certify that this deposition was thereafter carefully read over by the said witness and that he signed the same in my presence.

I certify that plaintiffs' exhibit 1, the packet of correspondence as produced by the witness, was so marked by me for identification and is returned herewith.

Lastly, I certify that I am not of counsel, nor am I related to either or any of the parties, nor am I interested [90] in the event of the cause; that this deposition, together with exhibit 1 attached, has been retained by me for the purpose of sealing up and directing the same to the clerk of the court, then and there to remain under my seal until opened in court, as required by law.

In Witness Whereof, I have hereunto set my hand and affixed my seal this 11th day of August, 1944.

[Seal] W. J. LAUCKHART

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Oct. 23, 1944.

[Endorsed]: Published Oct. 31, 1944. [91]

PLAINTIFF'S EXHIBIT No. 1 OF
DEPOSITION OF WHEELOCK

Kenneth H. Wheelock, Executive Vice President.
Chester J. Chastek, President.

(Copy)

STATEMENT

Chester J. Chastek Co.
Insurance and Surety Bonds
Insurance Building
Second Avenue at Madison Street
Main 9040
Seattle

January 28th, 1942

Mr. Oluf B. Haney
1925 Boren
Seattle, Washington

Date	Charges	Credits	Balance
11/19/41	Franklin Fire #44298		37.50
12/20/41	" " "		37.50
12/23/41	" " "		22.50
1/20/42	" " "		37.50
			135.00

We write Every Kind of Insurance and Surety
Bonds! Chester J. Chastek Co. [93]

(Copy)

January 28th, 1942

Marine View Boat Building Co.

Tacoma, Washington

Attention: Mr. Peterson

Dear Sir:

We enclose for your records, extension endorsement to February 20th, 1942 and once again call to your attention that you should notify us when the engine is ready to be installed.

You will note that our policy reads in the amount of \$15,000.00 with a valuation of \$15,000.00 which is all the liability that there is until the engine is ready to put in.

With our kind personal regards, we remain,

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vice President

KHW/vr [94]

January 28th, 1942

Mr. Oluf B. Haney

1925 Boren Avenue

Seattle, Washington

Dear Mr. Haney:

We are enclosing extension endorsement from January 20th to February 20th, together with our statement in the amount of \$135.00 which is the total premium due us, to date.

We should appreciate your check to cover at your

convenience and once again, please make certain to let us know when the engine will leave the Washington Iron Works.

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vice President.

KHW/vr [95]

August 30, 1941

Mr. Peter Petersen

c/o Marine View Boat Bldg. Co.

Box 141-A, R.F.D. 6

Tacoma, Washington

Dear Mr. Petersen:

We enclose for your records a copy of the policy covering Hull No. 2 under construction for Mr. Oluf Hanney. Please make certain that you notify us at least one week in advance of the time that you expect to install the engine.

With our kind personal regards, we remain

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vice-President

KHW:L

cc Mr. Oluf Hanney [96]

August 30, 1941

Mr. Oluf B. Haney
1925 Boren Avenue
Seattle, Washington

Dear Mr. Haney:

We have issued Franklin Fire Insurance Company policy #44298 in the amount of \$15,000.00 covering your boat while under construction by Mr. Petersen. We thought it best to hold the policy in our office until we were certain as to your present location, but we did want you to know that we had protected your interests in this matter.

If you will let us know where you wish to have us mail the policy, we shall be very pleased to do so.

With our kindest personal regards, we remain

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vice-President

KHW :L [97]

January 3rd, 1942

Mr. Peter Peterson
Marine View Boat Building Company
Tacoma, Washington

Re: Franklin Fire Insurance Company
Policy Number 44298

Dear Mr. Peterson:

We enclose your copy of the endorsement to your Builders' Risk policy covering the launching and trial trip of Mr. Haney's boat.

You will recall that when Mr. Moore and I called

upon you in Tacoma at the time that the keel was laid, that we asked you to inform me as to when the engine would be installed so that we could issue the necessary endorsement to cover.

Mr. Haney has informed me this morning, that the engine will be ready in approximately two weeks at which time we are to be notified by the Washington Iron Works, and we will provide the required coverage in accordance with your original instructions to us as well as Mr. Haney's instructions to us.

Should there be any further information which you desire, will you be so kind as to let us know immediately in order that the entire matter may be straightened out to everyone's satisfaction?

Yours very truly,

CHESTER J. CHASTEK CO.

[98]

December 17th, 1941

Mr. Olaf B. Haney
1925 Boren
Seattle, Washington

Dear Mr. Haney:

We are enclosing a copy of the endorsement which we furnished Mr. Peterson with, extending your hull insurance for 30 days from November 20th, together with our invoice in the amount of \$37.50. We are now in the process of extending this policy for an additional 30 days and just as soon as they will be ready to install the engine, we will increase the

amount of the policy to cover you against that hazard.

We shall appreciate your check to cover the invoice enclosed and with our kind personal regards, we remain,

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vice President

KHW/vr [99]

December 17th, 1941

Mr. Peter Peterson

Marine View Boat Building Co.

Tacoma, Washington

Dear Mr. Peterson:

I am sorry that I was out of the city when you were in Seattle the other day and I do not quite understand anything that took place.

Mr. Haney, the owner of the boat which you are building, ordered this insurance from our concern and I personally talked with you about it on two or three different occasions. The original policy was written, copy of which was sent to you and the premium was paid to us by Mr. Haney. The original policy was written for a period of three months and was extended on November 20th for an additional 30 days and is now in the process of a further 30 day extension.

So that your own records may be correct, we attach a copy of the original endorsement issued in November and will likewise furnish you with a

further endorsement for the next 30 day period. We are, as usual, billing these to Mr. Haney and we feel sure that everything is being handled in accordance with his instructions to us.

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vice President

KHW/vr [100]

December 20th, 1941

Mr. Oluf B. Haney
1925 Boren Avenue
Seattle, Washington

Dear Mr. Haney:

We are enclosing extension endorsement from December 20th, 1941 to January 20th, 1942 in connection with the Hull insurance on your boat under construction.

We likewise attach our invoice in the amount of \$37.50 and trust that you will find it to be in order.

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vive President

KHW/vr

cc: Peterson & also a copy of the end. [101]

November 24, 1941

Mr. Oluf B. Hanney
c/o Marine View Boat Bldg. Co.
Box 141-A, R.F.D. 6
Tacoma, Washington

Re: The Franklin Fire Ins. Co.
Policy #44298—

Dear Mr. Haney:

We have extended your policy covering Halibut Boat Hull #20 for one more month, and are enclosing our invoice in the amount of \$37.50 which is the premium for this extension. We trust that meets with your approval.

Kindly let us know when the engine will be installed so that we can endorse your policy accordingly.

With our kind personal regards, we remain,

Yours very truly,

CHESTER J. CHASTEK CO.

KENNETH H. WHEELOCK

Vice-President

khw:w [102]

March 16th, 1942

Mr. Olaf Haney
7740 12th N. W.
Seattle, Washington

Dear Mr. Haney:

The following is your account at is now stands on our books:

5/14/41	Mass.	13482	150.00	
6/11/41	Paid			150.00
8/20/41	FF	44298	111.00	
10/24/41	Paid			111.00
11/19/41	AP	44298	37.50	Nov.-Dec.
12/20/41	AP	44398	37.50	Dec.-Jan.
12/23/41	AP	44298	22.50	
1/20/42	AP	44298	37.50	Jan.-Feb.
2/ 2/42	AP	44298	37.50	
2/25/42	AP	44298 *	120.00	Feb. to Mar.
2/25/42	CM	44298	322.50	22.50
2/25/52	Paid			75.00
			Balance.....	195.00

[Figures penciled in margin] :

195.00

37.50

157.50

30

127.50

75

202.50

If this does not agree with your records, kindly let us know and we shall recheck our figures again.

Yours very truly,

CHASTEK & WHEELOCK
INC.

KENNETH H. WHEELOCK

Vice President

/vr [103]

(Copy)

Receipt stamp endorsement: Received Jul. 18,
1941. Chastek.

Marine View Boat Building Co.

Box 141-A

R.F.D. 6

Tacoma, Washington

July 17, 1941

Chester J. Chastek Co.

Insurance Building

Seattle, Washington

Dear Sir:

In reply to your letter of July 12th, we wish to
advise that the keel for Mr. Haney's boat, Hull #20,
will be laid in approximately three weeks.

We are unable to designate an exact date at the
present time. However, if the exact date is re-
quired, we will let you know as soon as it has been
established.

Very truly yours,

MARINE VIEW BOAT BLDG.
CO.

PETER PETERSEN

Peter Petersen

PP:ep [104]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 718

OLUF B. HANNEY, HANS MIKELSEN, and
PAUL VOHL,

Plaintiffs,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA,
a corporation,

Defendant.

JUDGMENT

This cause having come on for trial on the 31st day of October, 1944, before the Honorable John C. Bowen, Judge of the above entitled court, and a jury duly impanelled and sworn to try the cause, the plaintiffs appearing in person and by C. E. H. Maloy, their attorney, and the defendant appearing by Hayden, Merritt, Summers & Stafford, Mathew Stafford and Lane Summers, and the plaintiffs having introduced evidence both oral and documentary, and the defendant having introduced evidence both oral and documentary, and the cause having been argued by respective counsel for plaintiffs and defendant, and the Court having duly instructed the jury, and the jury having retired to consider their verdict, and having on the 2nd day of November, 1944, returned a verdict in favor of the plaintiffs and against the defendant in the sum of

Seventy Two Hundred and 00/100 (\$7200.00) Dollars, and the defendant having filed a motion for judgment notwithstanding the verdict, and the same having thereafter and on Friday, November 10, 1944, been argued to the Court, and said motion having been then denied and overruled, and the Court now being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the plaintiffs, Oluf B. Hanney, Hans Mikelsen and Paul Vohl, have and recover of and from defendant The Franklin Fire Insurance Company of [105] Philadelphia, Pennsylvania, a corporation, the sum of Seventy Two Hundred and 00/100 (\$7200.00) Dollars and interest at the rate of 6 (6%) per cent per annum from February, 24, 1942, until paid, together with plaintiffs' costs taxed herein in the sum of \$71.62 and that execution issue therefor. Defendant excepts to the entry of the judgment and specifically excepts to that portion allowing interest and exceptions allowed.

Done in Open Court this 10th day of November, 1944.

JOHN C. BOWEN

District Judge

Presented by:

C. E. H. MALOY

Attorney for Plaintiffs

Approved as to form:

MATTHEW STAFFORD

Of Counsel for Deft.

[Endorsed]: Filed Nov. 10, 1944. [106]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Oluf B. Hanney, Hans Mikelsen and Paul Vohl,
Plaintiffs above named, and to C. E. H. Maloy,
their attorney:

Notice Is Hereby Given that The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment in favor of said plaintiffs and against said defendant, entered in the above entitled action on November 10, 1944.

Dated November 16th, 1944.

HAYDEN, MERRITT, SUM-
MERS & STAFFORD
LANE SUMMERS
MATTHEW STAFFORD
Attorneys for Defendant.

[Endorsed]: Filed Nov. 16, 1944. [107]

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Persons by These Presents:

That The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, as Principal, and United States Fidelity and Guaranty Company, a corporation authorized to do business within the State of Washington, as Surety, are held and firmly bound

unto Oluf B. Hanney, Hans Mikelsen and Paul Vohl, and each of them, in the full sum of Ten Thousand Dollars (\$10,000.00), for the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Whereas, in the above entitled action judgment was entered in favor of said Oluf B. Hanney, Hans Mikelsen and Paul Vohl, against The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, for the sum of Seventy-two Hundred Dollars (\$7200.00) plus interest and costs, from which The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania is appealing to the United States Circuit Court of Appeals for the Ninth Circuit by the filing herewith of its Notice of Appeal, pending which it desires hereby to stay and supersede said judgment until the determination of said appeal by said appellate court; [108]

Now, Therefore, the condition of the foregoing bond is such that if the said Principal shall prosecute its appeal to effect, shall satisfy said judgment (or any modification thereof by said appellate court) in full, together with all costs, interest and any damages for delay, if for any reason said appeal is dismissed or said judgment is affirmed or modified, and shall satisfy all costs, interest and any damages awarded against it by said appellate court,

then this bond shall be void; otherwise it shall continue in full force and effect.

Dated November 16th, 1944, at Seattle.

THE FRANKLIN FIRE IN-
SURANCE CO. OF PHILA-
DELPHIA, PENNSYL-
VANIA,

(Principal)

By E. C. COCHRANE

Its Marine Manager

[Seal]

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

(Surety)

By JOHN C. McCOLLISTER

Its Attorney in Fact

The foregoing bond is hereby approved.

C. E. H. MALOY

Attorney for Appellees

The foregoing bond is hereby approved; upon the filing thereof execution of said judgment shall be stayed pending determination of said appeal, subject to the order of said appellate court.

Done in open court November 16, 1944.

JOHN C. BOWEN

U. S. District Judge

[Endorsed]: Filed Nov. 16, 1944. [109]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

and

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

The appellant, The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, upon its appeal in the above entitled action relies upon the following points:

(1) That the District Court erred by failure and refusal to grant before and without trial the defendant's motion for summary judgment under Rule 56, argued and submitted on October 31, 1944;

(2) That the District Court erred by entering order denying the defendant's motion for summary judgment under Rule 56 on October 31, 1944;

(3) That the District Court erred by entering final judgment on November 10, 1944, in favor of the plaintiffs and against the defendant, because the latter continued entitled to summary judgment in its favor without trial upon its said motion under Rule 56 as of October 31, 1944;

(4) That the District Court erred in the final judgment entered on November 10, 1944, by allowing interest upon the plaintiffs' unliquidated demand from February 24, 1942, the date of the loss, rather than from November 10, 1944, the date of said judgment. [110]

Further the appellant, The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, designates portions of the record in the District Court to be contained in the record on appeal, as follows:

(1) The whole of plaintiffs' amended complaint, filed September 10, 1943;

(2) Exhibit A attached to plaintiffs' original complaint (being photostatic copy of insurance policy incorporated into plaintiffs' amended complaint by reference);

(3) Exhibit B attached to plaintiffs' original complaint (being list of property lost by fire, incorporated into plaintiffs' amended complaint by reference);

(4) Order of dismissal as to second cause of action in plaintiffs' amended complaint, based upon waiver thereof in open court, filed November 29, 1943;

(5) Defendant's "Request for Admissions under Rule 36", filed October 19, 1944—including as a part thereof agreement attached thereto and mentioned therein as "Agreement of May 14, 1941, between Peter Petersen and Oluf B. Hanney";

(6) Plaintiffs' "Statement in Response to Request for Admissions under Rule 36", filed October 12, 1944;

(7) Defendant's second amended answer to plaintiffs' amended complaint, filed October 28, 1944—including longhand endorsement thereon signed by Mr. C. E. H. Maloy, attorney for plaintiffs, reading as follows: "Plaintiffs hereby consent to the filing of the above. Dated October 25, 1944. C. E. H. Maloy, Attorney for Plaintiffs."

(8) Defendant's motion for summary judgment under Rule 56, filed October 27, 1944; [111]

(9) Order denying defendant's motion for summary judgment, filed October 31, 1944;

(10) Deposition of Henry Stakset, taken October 18, 1944, filed October 26, 1944, and published October 31, 1944;

(11) Deposition of Kenneth H. Wheelock, taken August 4, 1944, filed October 23, 1944, and published October 31, 1944, together with all correspondence designated therein as Plaintiffs' Exhibit No. 1 of Deposition of Wheelock;

(12) Final judgment filed and entered November 10, 1944.

Dated November 16th, 1944.

HAYDEN, MERRITT, SUM-
MERS & STAFFORD

LANE SUMMERS

MATTHEW STAFFORD

Attorneys for Appellant

Copy Rec'd 11/16/44.

C. E. H. MALOY

Atty for Pltff.

[Endorsed]: Filed Nov. 16, 1944 [112]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 125, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipes and designations of counsel for appellant filed and shown herein and requested under the provisions of Rule 75 (j) of the Rules of Federal Civil Procedure, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, subject to such order as the Circuit Court of Appeals may hereafter enter, constitute the record on appeal herein from the Judgment dated November 10, 1944, of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act of Feb. 11, 1925) for	
making record, certificate or return,	
101 folios at 15c.....	\$15.15
221 folios at 5c (Copies furnished).....	\$11.05
Appeal fee (Sec. 5 of Act).....	\$ 5.00
Certificate of Clerk to Transcript.....	\$.50
Total	\$31.70

I hereby certify that the above costs in the sum of \$31.70 have been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 30th day of November, 1944.

[Seal] MILLARD P. THOMAS,

Clerk

By TRUMAN EGGER

Chief Deputy

[Endorsed]: No. 10938. United States Circuit Court of Appeals for the Ninth Circuit. The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, a corporation, Appellant, vs. Oluf B. Hanney, Hans Mikelsen and Paul Vohl, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed December 4, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10938

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees,
(Plaintiffs),

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA,
a corporation,

Appellant,
(Defendant).

APPELLANT'S STATEMENT OF POINTS
AND APPELLANT'S DESIGNATION OF
RECORD

I.

Appellant hereby adopts and reiterates by reference its "Statement of Points on which Appellant Intends to Rely on Appeal" as contained in certified typewritten transcript on appeal (Tr. p. 110), filed in the above entitled court December 4, 1944.

II.

Appellant hereby designates for printing parts of the record necessary for the consideration of the points upon which it relies, as follows:

(1) The whole of plaintiff's amended complaint, filed September 10, 1943, (Tr. pp. 2-7);

(2) Exhibit A attached to plaintiffs' original complaint (being photostatic copy of insurance

policy incorporated into plaintiffs' amended complaint by reference), (Tr. pp. 8-17);

(3) Exhibit B attached to plaintiffs' original complaint (being list of property lost by fire, incorporated into plaintiffs' amended complaint by reference), (Tr. pp. 18, 19);

(4) Order of dismissal as to second cause of action in plaintiffs' amended complaint, based upon waiver thereof in open court, filed November 29, 1943 (Tr. p. 20);

(5) Defendant's "Request for Admissions under Rule 36", filed October 19, 1944, (Tr. pp. 21-23)—including as a part thereof agreement attached thereto and mentioned therein as "Agreement of May 14, 1941, between Peter Petersen and Oluf B. Hanney," (Tr. pp. 24-27);

(6) Plaintiffs' "Statement in Response to Request for Admissions under Rule 36", filed October 12, 1944, (Tr. pp. 28, 29);

(7) Defendant's second amended answer to plaintiffs' amended complaint, filed October 28, 1944—including longhand endorsement thereon signed by Mr. C. E. H. Maloy, attorney for plaintiffs, reading as follows: "Plaintiffs hereby consent to the filing of the above. Dated October 25, 1944. C. E. H. Maloy, Attorney for Plaintiffs" (Tr. p. 30);

(8) Defendant's motion for summary judgment under Rule 56, filed October 27, 1944, (Tr. p. 31);

(9) Order denying defendant's motion for summary judgment, filed October 31, 1944, (Tr. p. 34);

(10) Deposition of Henry Stakset, taken Octo-

ber 18, 1944, filed October 26, 1944, and published October 31, 1944, (Tr. pp. 35-66), together with Exhibit No. 1, (Tr. pp. 67, 68) and Exhibit No. 2 thereof, (Tr. pp. 69-72);

(11) Deposition of Kenneth H. Wheelock, taken August 4, 1944, filed October 23, 1944, and published October 31, 1944, (Tr. pp. 73-91), together with all correspondence designated therein as Plaintiffs' Exhibit No. 1 of Deposition of Wheelock, (Tr. pp. 92-104);

(12) Final judgment filed and entered November 10, 1944, (Tr. pp. 105, 106);

(13) Appellant's Notice of Appeal, (Tr. p. 107);

(14) Appellant's Supersedeas Bond, (Tr. p. 108);

(15) Clerk's minute entries under date of October 31, 1944, relative to motion for summary judgment, argument thereon, and publication of depositions in connection therewith, (Tr. p. 32);

(16) Appellant's "Statement of Points on which Appellant Intends to Rely on Appeal", (Tr. p. 110), and "Appellant's Designation of Contents of Record on Appeal", (Tr. pp. 111, 112).

Appellant hereby designates for omission from printing parts of the record unnecessary for the consideration of the points upon which it relies. as follows:

(1) Appellant's "Praeceptum for Transcript of Record on Appeal", (Tr. p. 113);

(2) "Appellees' Designation of Additional Portion of Record, Proceedings and Evidence on Appeal", (Tr. p. 114);

(3) Appellees' "Motion for an Order Requiring Appellant to Furnish Additional Portions of Record on Appeal or for Extension of Time", (Tr. pp. 115, 116), including affidavit of C. E. H. Maloy in support thereof, (Tr. pp. 116, 117);

(4) "Affidavit in Behalf of Appellant, Resisting Motion of Appellees for Inclusion of Transcript of Trial Proceedings and Evidence Within the Record on Appeal", (Tr. pp. 118-120);

(5) Order of court granting Appellees' "Motion for an Order Requiring Appellant to Furnish Additional Portions of Record on Appeal or for Extension of Time", (Tr. pp. 121, 122);

(6) Appellant's "Praeipie for Record", (Tr. pp. 123, 124);

(7) Appellant's "Supplemental Praeipie for Transcript of Record", (Tr. p. 125).

Dated December 7, 1944, at Seattle.

HAYDEN, MERRITT, SUM-
MERS & STAFFORD
LANE SUMMERS
MATTHEW STAFFORD

Attorneys for Appellant

Copy received Dec. 7, 1944.

C. E. H. MALOY

Attorney for Appellees.

[Endorsed]: Filed Dec. 14, 1944. Paul P.
O'Brien, Clerk.

No. 10938

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE FRANKLIN FIRE INSURANCE CO.
OF PHILADELPHIA, PENNSYLVANIA,
a Corporation,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

SUPPLEMENTAL
Transcript of Record
In Two Volumes
VOLUME II
Pages 137 to 353

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JAN 18 1945

No. 10938

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE FRANKLIN FIRE INSURANCE CO.
OF PHILADELPHIA, PENNSYLVANIA,
a Corporation,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

SUPPLEMENTAL
Transcript of Record
In Two Volumes
VOLUME II
Pages 137 to 353

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

[Title of District Court and Cause.

PROCEEDINGS AT HEARING ON MOTION
FOR SUMMARY JUDGMENT

Be It Remembered, that heretofore and on to-wit
October 31, 1944, at the hour of 10:00 a.m., the above
entitled matter came on for Hearing on Motion for
Summary Judgment before the Hon. John C.
Bowen, one of the Judges of said Court;

Plaintiffs appearing by C. E. H. Maloy, Esq.,
their attorneys and counsel;

Defendant appearing by Lane Summers, Esq.,
Matthew Stafford, Esq., and Stanley A. Taylor,
Esq., (Messrs. Hayden, Merritt, Summers & Staf-
ford), its attorneys and counsel.

Whereupon, the following proceedings were had:
Mr. Maloy: I will call Hans Mikelsen.

HANS MIKELSEN,

one of the plaintiffs, being first duly sworn, testi-
fied as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your name and resi-
dence? A. Hans Meikelsen.

Q. You can remain seated, Mr. Mikelsen.

A. Hans Mikelsen. South Colby, Washington.

Q. Where is South Colby?

A. It is across the Sound here.

Q. Across the Sound? A. Yes.

Q. How long have you lived there?

A. Oh, for about 20 years.

(Testimony of Hans Mikelsen.)

Q. During what period of time, what has been your business, Mr. Mikelsen? A. Fishing.

Q. What kind of fishing have you been engaged in? A. Purse seining.

Q. Have you been engaged in any other kind of fishing than purse seining?

A. Halibut fishing.

Q. Any other kind of fishing? A. No.

Q. Have you been engaged in any other business than the fishing business during this last 20 years?

[21]

A. No.

Q. Have you been the owner of a fish boat or fish boats during such period of time? A. No.

Q. You are acquainted with the Plaintiff Oluf B. Hanney? A. Yes.

Q. And, of course, Paul Vohl? A. Yes.

Q. State whether or not you men are partners in a vessel known as the Trade Wind?

A. Yes, sir.

Q. When was the Trade Wind built?

A. '41.

Q. Would you mind telling us as to the nature of your interest in that vessel?

A. I bought in with Oluf Hanney and Paul Vohl when they laid the keel on the boat.

Q. When was that, Mr. Mikelsen?

A. That were in August in '41.

Q. August '41? A. Yes.

Q. Where was that vessel then being built?

Mr. Stafford: Just a moment, if your Honor

(Testimony of Hans Mikelsen.)

please. I object to that question on the ground that it is not the best evidence. There is written evidence of where that vessel was being built.

The Court: Is this preliminary?

Mr. Maloy: Yes, your Honor. Most assuredly a man can testify that he owns something.

Mr. Stafford: I have not objected to his testifying [22] that he owns something.

Mr. Maloy: That is what I am asking him.

The Court: The objection was made to his testifying where it was being built, and I think that objection should be overruled.

Q. (Mr. Maloy) Will you state where the vessel was being built?

A. At Tacoma, Washington.

Q. When did construction of that vessel commence?

Mr. Stafford: The same objection, if your Honor please.

The Court: The objection is overruled.

A. It was about August. I can't exactly remember the date, but it was in August in '41.

Q. At or about the time that you commenced to have that vessel built, say, in August, 1941, did you have any negotiations or business with Chester J. Chastek & Company with regard to securing some insurance?

A. Yes.

Q. When was that, Mr. Mikelsen?

The Court: Was that by written communication?

Mr. Maloy: No, your Honor, I think not.

(Testimony of Hans Mikelsen.)

The Court: Very well. You may state if you know, but do not refer to the contents of a written document, nor to any uncertainty in your own mind. If you know the answer, you can state it.

The Witness: August 20.

Q. (Mr. Maloy) August 20?

A. Yes.

Q. Did you see Mr. Wheelock? [23]

A. Yes.

Q. Were you alone, or was somebody else with you?

A. Mr. Hanney was with me.

Q. Where did you see Mr. Wheelock?

A. Up to his office.

Q. Where was that?

A. 3 or 4 blocks up here.

Q. Do you know the name of the building?

A. Yes. Insurance Building, I think.

Q. In the Insurance Building?

A. Yes.

Q. Just tell the jury what took place at his office in the presence of you and Mr. Hanney, with Mr. Wheelock, on this occasion.

Mr. Stafford: I would like at this time—I think it would save time in the trial of this case—to state my objection to this testimony rather fully, and perhaps——

The Court: (Interrupting) You can state your objection without argument, and at some time, if it is vital to argue the matter, I will give you an opportunity in the absence of the jury.

(Testimony of Hans Mikelsen.)

Mr. Stafford: I think that it is just exactly that. I think it is that pressing.

The Court: Very well. The jury will temporarily retire.

(Whereupon, the jury retired to the jury room, and the following proceedings were had in their absence and without their hearing.)

Mr. Stafford: Now, if your Honor please, that [24] question can clearly have no purpose other than to have admitted in evidence here either circumstances or conversations pertaining to this policy, which are, of course, extraneous and extrinsic to the policy itself; and to that sort of evidence at this time the defendant objects, because, first, of course, I wish to reiterate the position of the defendant that the construction contract of May 14, 1941, and the policy, leave no ambiguity as to the subject matter of this insurance, and therefore leave no room for and render improper the reception of parol evidence to explain it.

We wish also at this time to make the further objection that this court cannot admit parol evidence without first having before it the contract which the parol evidence is offered to explain. It is perhaps the position of counsel for plaintiffs that the policy is already in evidence here by reason of the fact that its execution is admitted. However, he has stated to the jury that the policy would be offered in evidence. It is perfectly clear that the construction contract of May 14, 1941, is not presently in evidence.

(Testimony of Hans Mikelsen.)

Now, it is our position that under the parol evidence rule, before your Honor can permit parol evidence of the type called for by the question which the reporter just read, to go to the jury, you must first decide as a preliminary matter the question of law, whether or not the contract is ambiguous, in what respect it is ambiguous; and then, having determined that it is ambiguous and in what respect it is ambiguous, only then can the Court rule on the admissibility of testimony of this [25] type.

The Court: Did you wish to give the Court the benefit of any specific authority to that effect?

Mr. Stafford: Williston on Evidence is just replete with it, your Honor. I could read for the rest of the afternoon from him on it.

The Court: Could you read one or two good passages?

Mr. Stafford: I intended to bring the volume up. It was so long that I didn't copy it into the brief, and for that reason I can't comply with your Honor's suggestion; but that it is the law I doubt very seriously that Counsel will question, that the Court must as a matter of law pass first on the question of the existence of the ambiguity and its extent, in order to admit parol evidence; and then only can parol—the third part of my objection which I wish to make at this time is that parol evidence, even though the Court may hold that this contract is ambiguous, even then testimony of this type can be admitted only for the purpose of ex-

(Testimony of Hans Mikelsen.)

plaining the intent expressed, and not of extending the coverage to something that is not expressed.

Those are the three portions of my objection, although the third is probably not called for at this time. The first two are called for.

It is my position that until Counsel puts in evidence the entire contract, which, of course, we maintain consisted of the policy and construction contract, he cannot offer any parol evidence to explain them, because the Court can't determine what if any ambiguity there is.

The Court: Mr. Maloy, did you wish to respond? [26]

Mr. Maloy: Well, your Honor,—

The Court: Counsel may remain at their stations during the course of the trial.

Mr. Maloy: Well, your Honor, in the first place, I think your Honor has held this morning that the contract is ambiguous or obscure and of doubtful meaning, in your ruling on the motion for summary judgment; and I understood, and I do understand, that your ruling was based on what the court of appeals held, which was that it was obscure and ambiguous.

So the Court of Appeals has already held that it is ambiguous; and if they have held it is ambiguous, then they said that we are entitled to introduce evidence of the surrounding circumstances to determine the intention of the parties.

Now, I have lots of authority, and I have Jones

(Testimony of Hans Mikelsen.)

on Evidence right here now, where the rule is laid down; and I read from *Corpus Juris* this morning where the rule was laid down as to the type of evidence that was admissible to determine the intention of the parties in a case where the contract or the policy of insurance, the contract of insurance, whatever we want to call it, is ambiguous.

The Court: I understood him to make two points. The first was that you ought to have the contract in evidence.

Mr. Maloy: Oh, I will put the contract in evidence. I will put the insurance policy in evidence, your Honor, of course.

The Court: And the second point—— [27]

Mr. Maloy: (Interposing) I am leading up to that.

The Court: And the second point, as I understood it, was that you ought to specify the particular ambiguity in question.

Mr. Maloy: Well, of course, the particular ambiguity is in the language of the policy, and particularly that portion of it where it says “all materials belonging and destined for the boat, Hull No. 20.” ’

Now, there is where the Circuit Court held that that language in appropriate circumstances would cover the risk here.

The Court: It being the Plaintiffs’ contention that that means what?

Mr. Maloy: That it means that the policy is

(Testimony of Hans Mikelsen.)

ambiguous. Oh, you mean as to the word “destined”?

The Court: Yes.

Mr. Maloy: Well, our position is just this, your Honor, in connection with that language. The policy says “on hull, tackle, apparel”—I won’t read all of it—“machinery, appurtenances and so forth,” and then it says, “including plans, patterns, molds and so forth, boats, and other furniture and fixtures, and all material belonging and destined for Halibut Boat Hull No. 20.”

Now, the Circuit Court held, as I recall the language, that that was a pretty extensive word. It is the theory of the Plaintiffs or the contention of the Plaintiffs and the position of the Plaintiffs that that language is broad enough and does include this particular property which was purchased for this boat and which belonged and was destined for it. [28]

Now, there is the language that is ambiguous. The Circuit Court said that was ambiguous.

Now, we want to go into the surrounding facts and circumstances so as to show the knowledge of the insurer that this property was located in this locker here in Seattle, and that the plaintiffs wanted it insured, and they were told by the insurance agent that that language covered it.

Now, that is admissible under all the authorities, and——

The Court: (Interrupting) I don’t believe you need to go any farther unless you wish the record

(Testimony of Hans Mikelsen.)

to show the authorities that you rely upon for that point.

Mr. Maloy: Well, I have Corpus Juris here which I read to your Honor this morning. I have Volume 3 of Jones on Evidence where the matter is referred to at length and along the same lines.

The Court: As I understand you, you are willing to meet the objection that the contract itself must be in evidence?

Mr. Maloy: Oh, I am going to introduce—I will introduce it right now.

The Court: All right.

Mr. Stafford: That doesn't complete that point. That only partially completes it. I will have no objection and agree to the admission of the policy in evidence.

The Court: It may be done now, the same as if the jury were present?

Mr. Stafford: It may be.

The Court: And have the same effect in the trial [29] of this case? Is that agreeable?

Mr. Stafford: That is agreeable.

The Court: The policy may now be marked plaintiffs' Exhibit 1.

Mr. Stafford: I should like an opportunity, of course, to examine it.

(Whereupon, Policy of Insurance issued by The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, dated August 20, 1941, was marked Plaintiffs' Exhibit No. 1 for identification.)

(Testimony of Hans Mikelsen.)

Mr. Stafford: Now, if your Honor please, the policy having been——

The Court: (Interrupting) Now I will give it to you and let you look at it.

Mr. Stafford: I am sorry. The policy having been admitted in evidence——

The Court: I haven't ruled yet.

Mr. Stafford: Oh, I thought you had. That is right, I wanted to examine it, yes.

The Court: Plaintiffs' Exhibit No. 1 is now admitted.

(Whereupon, Plaintiffs' Exhibit No. 1 for identification was admitted in evidence.)

(Set out in full as exhibit A, page 10.)

The Court: Did you wish to make a further statement?

Mr. Stafford: Yes, I did, if your Honor please. Now, the insurance policy in question now being in evidence in this case, the Defendant wishes to point out that the Court is not yet in a position to pass upon the [30] preliminary legal question of the existence of an ambiguity here because the entire contract of the parties is not yet before the Court. By that I mean, of course, that the policy is incomplete standing alone, and can be completed only by the reception in evidence in this case of the construction contract of May 14, 1941, to which the policy refers, and without which the policy cannot, in our opinion, be properly interpreted.

The Court: Do you wish it marked for identification at this time and submitted to opposing coun-

(Testimony of Hans Mikelsen.)

sel to see if he has any objection to its admission in evidence at this time?

Mr. Stafford: Did you bring the original contract with you, Mr. Maloy?

Mr. Maloy: Yes, I think so; but I do not want to be understood as offering it.

The Court: I understand that that is your position. This will be marked Defendant's Exhibit A-1.

(Whereupon, Agreement, dated May 14, 1941, between Peter Petersen and Oluf B. Hanney, was marked Defendant's Exhibit A-1 for identification.)

The Court: Is there any question about the authenticity of it?

Mr. Maloy: No, I think not, your Honor.

The Court: Then, Mr. Stafford, if you so desire, you can state for the record the identity of it, which I think is admitted by—you can state the identity of Defendant's Exhibit A-1 which you think is admitted by [31] the Plaintiffs. I mean, state the identifying characteristics of the document which you think are admitted by the Plaintiffs.

Mr. Maloy: I don't want any misunderstanding. The Plaintiffs are not going to be held responsible for this agreement, or they are not offering it; and, of course, if offered by the Defendant, would object to its being introduced in evidence at this time or at any other time.

The Court: Will you state what the instrument is? That is all the Court meant to say.

(Testimony of Hans Mikelsen.)

Mr. Stafford: By the construction contract of May 14, 1941, to which I referred in my remarks of a few moments ago, I mean the document now marked by the Clerk of this Court as Defendant's Exhibit A-1, consisting of three and a half typewritten pages, entitled "Agreement," and stating its date to be May 14, 1941, and the parties to it to be Peter Petersen and Oluf B. Hanney, and bearing the signatures Peter Petersen, First Party, O. B. Hanney, Second Party.

Is that sufficient?

The Court: Is it what is known as the construction contract in this case?

Mr. Stafford: Yes, if your Honor please. This is the document which has been produced by the Plaintiffs in response to a demand by me on behalf of the Defendant to produce the original construction contract at this trial.

The Court: Is there any objection that the document is not what it purports to be?

Mr. Maloy: Oh, no. It is genuine, your Honor.

[32]

The Court: Your objection runs to its admissibility?

Mr. Maloy: Yes, your Honor; and I notice it has been marked as an exhibit. Now, I think it ought to be marked for identification.

The Court: It hasn't been received. It hasn't

(Testimony of Hans Mikelsen.)

been marked received. It is an identified exhibit. It has not been received in evidence.

Mr. Stafford: Now, to conclude my remarks, it is our position, as I have already stated, I believe, but I am not sure, that the Circuit Court of Appeals has said, and it is the law of this case, that there is an ambiguity in this policy when considered alone. It is our position that all ambiguity that exists here with respect to subject matter—and Counsel in his opening statement or in his statement here a few moments ago to the Court stated that the ambiguity was solely a question of what was the subject matter. It is our position that if this Defendant's Exhibit A-1 and Plaintiffs' Exhibit 1 are considered together, that there is no ambiguity; first, that they must be considered together because they are parts of the same transaction, because the policy is replete with references to Defendant's Exhibit A-1; and that being considered together, the policy is entirely free from ambiguity so as to make the reception of parol evidence unnecessary and improper.

Now, I should like, if your Honor please, to quote from Mr. Wigmore's work on evidence.

The Court: Mr. Stafford, this point has been covered thoroughly by briefs filed on the subject by both sides and argued at great length on prior occasions. [33]

Mr. Stafford: I don't intend to go over that ground. The point that I was about to make, your

(Testimony of Hans Mikelsen.)

Honor, I don't think has ever been made before, because it could only be made at a trial.

The Court: All right.

Mr. Stafford: And that is this: Wigmore, Section 2104, says that where a writing offer refers to another writing, the latter should also be put in—and, of course, it means in evidence—at the same time, provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former; the same principle would apply to another writing, not expressly referred to, but necessary by the nature of the documents to a proper understanding of the one offered. Much, therefore, will depend upon the circumstances of each case and the character of each document, and no fixed rule can fairly be laid down. The trial court's discretion should control.

Now, if your Honor will recall, Mr. Maloy in his statement to the jury told about the construction contract, told about buying the performance bond, and told about buying the builder's risk insurance.

It is perfectly apparent that even in Mr. Maloy's mind those three documents are all part of a single transaction; that you cannot understand one without reference to the other.

That applies particularly to the builder's risk in the light of the construction contract.

Now, the point I am making is probably the same point that has been made before, but as to which I do [34] not intend to go back over all those elaborate arguments, but the point I am making is that

(Testimony of Hans Mikelsen.)

your Honor with this policy now in evidence is in no better position to pass upon a preliminary legal question of the existence of an ambiguity than he was before it was offered, and will not be in a proper position to do so until the other essential part of the transaction, namely, Defendant's Exhibit A-1, is also admitted in evidence.

The Court: What is the name of the case in 60 Wash. or 63 Wash.?

Mr. Maloy: Burbank vs.—I have it here.

The Court: It is the Burbank case. Do you recall the volume?

Mr. Maloy: 60 Wash. 253. I have it right here, your Honor.

The Court: No, I don't need to see it. I want to cite it as the basic authority in this State for sustaining the Plaintiffs' objection to the reception in evidence of the building contract as a necessary condition to admitting the insurance contract.

It may be that Wigmore has a view on this subject that supports the Defendant's contention here, that if the contract of insurance is to be received in evidence, there must along with it be received as a part of that very same contract, and in order to give the full and complete understanding of that insurance contract, also the building contract, the boat construction contract.

In the situation here as the matter is presented the Court is of the opinion that the Burbank case does not take that view contended for by Defendant, and that [35] in the situation here the Plaintiffs are

(Testimony of Hans Mikelsen.)

entitled to have received in evidence the insurance contract without having tacked upon that right the condition that also they must suffer to be received in evidence at this time the boat-building contract.

Mr. Stafford: For the purpose of the record, your Honor, may I cite two cases on this question?

The Court: I understood that the matter was submitted. You may for the purpose of the record cite the two cases.

Mr. Stafford: The two cases are a decision of our Ninth Circuit Court of Appeals, Metropolitan Life Insurance Company vs. Henderson, 92 F (2d) 891, and a decision of the Supreme Court of the State of Washington, 87 Wash. 237.

The Court: I assume, and as I recall from the briefs, there were other cases relied upon by Plaintiffs in this connection, but I will not stop to cite them now.

This ruling of the Court is without prejudice to the privilege of Defendant in its proper time in the course of the trial, should it be brought about in the proper way, to offer this boatbuilding contract as a part of its case in chief. I will pass upon that situation if and when it arises.

Mr. Stafford: Now, the only other thing I have to say, if your Honor please, you remember I suggested that a hearing now might save time during the trial. I would think it would be helpful to both the Court and Counsel if at this time it could be stipulated that the objection which I have just

(Testimony of Hans Mikelsen.)

made will not have to be restated [36] to similar testimony, but can be considered to go to all similar testimony.

However, I am perfectly willing to restate it each time if necessary.

Mr. Maloy: I don't care to make any stipulation, your Honor.

The Court: Just in each instance, state your objection for the record without argument. That is the only suggestion the Court will make.

Is there anything else that you think of? Any important issue in the matter or that is liable to be raised in the course of receiving the evidence that you would like to discuss in the absence of the jury?

If you can anticipate any such, I would think it would facilitate matters for you to bring up those questions now.

Mr. Stafford: There is one other thing, but I think your Honor has already anticipated it. I was going to suggest, in the absence of an offer of Defendant's Exhibit A-1 by the Plaintiffs, that Defendant be permitted to offer it at this time so that the entire matter would be before the Court. I will make that offer at this time.

The Court: You mean out of order as a part of your case in chief?

Mr. Stafford: That is right, but the Court has the right to take that out of order if the Court desires to do so, and I will make that offer at this time so that it will be before the Court.

(Testimony of Hans Mikelsen.)

The Court: The Court will entertain it as a part [37] of the Defendant's case in chief out of order, in order to accommodate the progress of the trial. Before ruling thereon, I will give Mr. Maloy for the Plaintiffs an opportunity to state his objection.

Mr. Maloy: I object to it as being incompetent, irrelevant and immaterial, and no part of the contract of insurance. The contract of insurance doesn't refer to it in any wise whatsoever. The contract of insurance was made three months or more later when they were discussing an entirely different matter than the building contract. I object to it either as a part of the Defendant's case in chief or part of the cross-examination of this witness or otherwise.

The Court: You offer it to prove or tend to prove what position or contention taken by the Defendant?

Mr. Stafford: Well, of course, the only answer I can make to that is that I offer it as a necessary part of the insurance policy; also as a document without which the insurance policy cannot be properly interpreted; also as a document which constitutes a part of the same transaction of which the insurance policy and the agreement evidenced by it was also a part.

The Court: And thereby to assist the Defendant in establishing the meaning of the policy as contended by the Defendant? Is that your position?

Mr. Stafford: Oh, yes, as contended for by the Defendant, but the assistance which I had hoped to

(Testimony of Hans Mikelsen.)

give by its introduction was primarily to the Court rather than to the Defendant.

The Court: This is a trial on an issue of fact be- [38] fore the jury.

Mr. Stafford: Could I be heard one bit further on this matter, because Mr. Maloy is already taking positions which are hopelessly inconsistent.

The Court: I wish you would clarify your own position before you argue. I would like to know what it is you seek to prove by this document, Defendant's Exhibit A-1, which you now offer in evidence.

Mr. Stafford: That is what I wanted to go into.

The Court: State it as briefly as possible, because I think I understand your position, and I think my views on the matter are in harmony with yours. It is a question of your advising the Court definitely what purpose you have in offering this document.

Mr. Stafford: First, in his opening statement to the jury, and since, Mr. Maloy has stated that the construction contract—he himself stated that to the jury, I didn't—the construction contract was entered into in May; but he said construction didn't begin right away, the keel wasn't laid until August, and therefore builder's risk insurance wasn't necessary until August. That is his own statement.

Now, in his argument and in his objection to the Court he says the construction contract is too remote; and why does he say so?

(Testimony of Hans Mikelsen.)

The Court: You needn't bother to reargue what you have already said.

Mr. Stafford: All right. So much for that part.

Now, answering the other part of your Honor's question, I can best put it this way: The only portion of [39] this policy which requires interpretation, by Mr. Maloy's own statement, is what constitutes the subject matter of this policy. He says the language, such and such, belonging and destined for halibut boat Hull No. 20, building at Tacoma, Washington, or Brown's Point, is ambiguous in the light of the decision of the Circuit Court of Appeals that may be the law of the case, that that is ambiguous; but we want this construction contract to go in evidence in this case for a number of reasons, the principal one of which is that in our view this contract, together with the admissions of record by Plaintiffs in this case, which Mr. Summers read at length to you this morning, which I shouldn't go back over, clears up any possible ambiguity that the Circuit Court of Appeals could have found in the policy when they were considering it alone.

In other words, we take the position that the question which is now being presented to you is entirely different from the question which was being presented to the Circuit Court of Appeals.

Now, I would like to refer to one passage in this contract. I am reading from page 2 of Defendant's Exhibit A-1. (Reading)

"It is understood and agreed that the vessel

(Testimony of Hans Mikelsen.)

herein contemplated shall be known and designated as Hull No. 20 during its construction, and that the keel for the same"—

Well, the rest of it is immaterial to this discussion. The words I want to call particular attention to are those, that the vessel herein contemplated shall be known [40] as Hull No. 20 during its construction.

All right. We look at the policy and we find that we insured material belonging and destined for Hull No. 20.

Now, you can look in all the dictionaries and you will not find Hull No. 20; but you look in this construction contract and you find the complete unambiguous definition of the term Hull No. 20, an artificial symbol adopted by whom? Adopted by Mr. Hanney and Mr. Petersen as a designation of the vessel. What vessel? A vessel during the period of its construction.

Now, the law is—and I have cases in my trial brief that seem clearly to establish it, even though I don't believe any cases are necessary—that the parties to the contract are competent, and the courts have no power in the world to disturb their right to use any language and to attribute to any language they use any peculiar meaning they desire. They can put in a contract the word "mile" and they can define "mile" to mean "inch," and in the interpretation of that contract the word "mile" must mean "inch."

(Testimony of Hans Mikelsen.)

The Court: I wish you would take this occasion to advance your own position by saying what it is in the contract that will help you in your contention as to the construction of the insurance contract you seek to make.

Mr. Stafford: That is what I thought I was doing, your Honor, but I am sorry I am not making myself clear.

The Court: Well, it is buried in such extensive argument that I lost it, I suppose. [41]

Mr. Stafford: Well, in a single sentence, it is this: The policy says, "We insure hull, tackle, and so forth, belonging and destined for Halibut Boat Hull No. 20 building at Brown's Point, Tacoma, Washington."

We say that the only way that you can arrive at the meaning of that phrase, Hull No. 20, is by reference to the construction contract, which completely defines it; and that definition excludes the material automatically and necessarily excludes coverage for the material contended for here.

The Court: I am ready to rule upon this question. The objections to the Defendant's offer of its exhibit A-1 are overruled, and that exhibit is now admitted in evidence, with the same effect, as I understand, by stipulation of counsel, as if the jury were present.

Mr. Stafford: I am perfectly willing to stipulate on that.

Mr. Maloy: I would like to have an exception, your Honor.

(Testimony of Hans Mikelsen.)

The Court: You may take and you are allowed an exception to the court's ruling.

Do you have any objection to the court's ruling upon this and admitting it in evidence when the jury is [42] not present? Is that point in your mind?

Mr. Maloy: No, that isn't the point. I object to it on the ground that it is irrelevant and immaterial, and no part of the insurance contract. There is no reference in the insurance contract to it. If it is admissible at all, it should be admissible as a part of the Defendant's case in chief, not now.

The Court: As I understand, that is the way it is being offered and also received. I admitted it out of order, it being offered as a part of the Defendant's case in chief, and in no other way, Mr. Maloy.

Did I misunderstand you? That was the condition of your offer, was it?

Mr. Stafford: That is right. You did not misunderstand me.

The Court: Very well.

(Whereupon, Defendant's Exhibit A-1 for identification was admitted in evidence.)

Mr. Stafford: Now, if your Honor please, with the policy and the agreement in evidence, and the admissions by Plaintiffs of record in this case, it is the position of the Defendant that, because the construction agreement for the purpose of this trial designated as Defendant's Exhibit A-1, provides a clear and unambiguous definition of the subject

(Testimony of Hans Mikelsen.)

matter of this insurance, so that resort to any parol evidence outside of these documents is unnecessary and improper.

The Court: Well, to what thing are you addressing this objection?

Mr. Stafford: I am addressing this objection to the [43] question last propounded by counsel for the Plaintiffs to the witness who is now on the stand, Mr. Mikelsen.

The Court: That objection is overruled.

Are there any other matters now that you anticipate may need to be taken up in the absence of the jury?

Mr. Stafford: No, I think not.

The Court: If not, bring in the jury.

(Whereupon, the jury returned to the jury box, and in their presence and within their hearing, the following proceedings occurred:)

The Court: Let the record show all are present. You may proceed.

Q. (Mr. Maloy): Mr. Mikelsen, we were speaking of your going up to Mr. Wheelock's office, you and Mr. Hanney, in August, 1941, regarding this insurance policy. I would like to ask you to tell the jury in your own words what conversation you and Mr. Hanney had with Mr. Wheelock on that occasion.

A. In August, 1941, I think it was on the 20th, we built this boat, and we also bought some netting for this boat—gear, we call it—down at the dock here, at Fishermen's Dock in Ballard; and we got

(Testimony of Hans Mikelsen.)

this insurance policy from Wheelock, and we didn't read it, so we asked him if this covered the stuff we got stored in the locker. He said, "Yes, it *cover* everything."

Q. Did you discuss the different clauses and conditions of the policy with him upon that occasion?

A. Yes. [44]

Q. I wish you would take the policy, I believe it is Plaintiffs' Exhibit 1, and point out and read any clause that you recall his having read to you upon that occasion.

A. Yes, this one here. He read the first one and he read this one.

The Court: Read it slowly, will you?

Q. (Mr. Maloy): Which one did he read first?

A. "On hull, tackle, apparel, ordnance, munitions, artillery, engines, boilers, machinery, appurtenances and so forth, including plans, patterns, molds and so forth, boats and other furniture and fixtures."

Q. Is that all of it? A. No.

Q. Read all of that clause, then.

A. And then, down here, he did read this one. "This insurance is also to cover all risks, including fire, while under construction and/or fitting out, including materials in buildings, work shops, yards and docks of the assured, or on quays, pontoons, etc."

Q. Did he read any other clauses of the policy?

A. Then he went farther down and he read another one.

(Testimony of Hans Mikelsen.)

Q. Do you remember what that one was?

A. I can't remember, but he said that this will cover you——

Mr. Stafford (Interrupting): Just a moment. I move to strike that.

The Court: Well, it is not responsive.

Mr. Stafford: No, it is not responsive.

The Court: That objection is sustained.

Q. (Mr. Maloy): I will ask this question, then: what else did [45] he say about those clauses?

A. He said, "This policy *cover* you with everything."

Mr. Stafford: Now, if your Honor please——

Q. (Interrupting): What were you——

Mr. Stafford (Interrupting): Just a moment. I move that that answer be stricken, and that the record show that we object to this testimony as being inadmissible because it is parol evidence, tending to vary the written contract which is before this court, and to extend this insurance in a manner in which it cannot be extended.

The Court: Do you wish to respond for the record what purpose you have in mind in offering this evidence?

Mr. Maloy: Yes, your Honor. I am offering the evidence to explain the ambiguity in the contract.

The Court: The intention of the parties by the use of the language in question?

Mr. Maloy: Yes, your Honor.

The Court: The objection is overruled.

Mr. Stafford: Exception.

(Testimony of Hans Mikelsen.)

The Court: Allowed:

Mr. Maloy: Now, would you read the question?

(The last question and answer thereto were read by the reporter.)

Q. (Mr. Maloy): In this conversation, who of you and Mr. Hanney did the talking? Did both of you talk or just one of you?

A. Both of us.

Q. Did you tell Mr. Wheelock where this fishing gear and equipment was at the time?

A. Yes. [46]

Q. Where did you tell him it was?

Mr. Stafford: If your Honor please, I am sorry that we couldn't agree so as not to make these objections necessary; but, not having so agreed, I must continue to make them.

I object to the witness being permitted to answer that question on the ground that it calls for parol evidence to vary a written contract, and to extend this insurance in a manner in which it cannot be extended, and because there is no ambiguity now before this court which needs explaining.

The Court: The objection is overruled.

Q. (Mr. Maloy): Now, will you answer that question, Mr. Mikelsen?

A. What?

The Court: Read the question to him.

(The question was read by the reporter.)

A. At Fishermen's Dock in Ballard.

(Testimony of Hans Mikelsen.)

Q. (Mr. Maloy): What is that?

A. At the Fishermen's Dock.

Q. What do they call it?

Mr. Stafford: The same objection.

The Court: Overruled.

Q. (Mr. Maloy): What do they call the Fishermen's Dock? Has it got any specific name?

A. Seattle Terminal.

Q. Salmon Bay Terminal?

A. Salmon Bay Terminal.

Q. Yes.

A. That is what they call it. [47]

Q. Did you tell him where it was in the Salmon Bay Terminal? A. Yes.

Q. Where? A. In Locker 325.

Mr. Stafford: The same objection.

The Court: Overruled.

Q. (Mr. Maloy): Did you and Mr. Hanney and Mr. Vohl subsequently acquire this fishing gear and equipment which was located in Locker 325 at Salmon Bay Terminal? A. Yes.

Q. From whom did you acquire it? From whom did you buy it?

A. We buy it from Henry Stakset.

Q. Where does Henry Stakset live?

A. Tacoma, Washington.

Q. When did you buy it from Mr. Stakset?

A. We were talking about the price in the early part of the spring, in May; but then later on when he came from Alaska, then we bought it. It was in the first part of August.

(Testimony of Hans Mikelsen.)

Q. In August? A. Yes.

The Court: What year?

Q. (Mr. Maloy): Of 1941? A. '41.

Q. Now, did you mention to Mr. Wheelock Mr. Stakset's name? A. Yes.

Mr. Stafford: The same objection, if your Honor please.

The Court: Overruled.

Q. (Mr. Maloy): What did you tell Mr. Wheelock, if anything, [48] with reference to this property that you were buying from Mr. Stakset?

Mr. Stafford: The same objection.

A. I told him that we bought this——

Mr. Stafford: (Interrupting) Just a minute, Mr. Mikelsen.

The Court: Overruled.

Q. (Mr. Maloy): Go ahead and answer the question.

A. I told him that we bought this netting and property from Stakset, that we wanted covered, and he said "Yes".

Q. What is that?

A. And he said "Yes, it is covered." He didn't read the whole policy.

Q. Now, did you get the policy that day?

A. No, we didn't.

Q. Did you order the policy that day?

A. I believe he send the policy to Mr. Hanney.

Q. Yes; I will ask you about that later, but did you order the policy issued at that time?

A. Yes.

(Testimony of Hans Mikelsen.)

Q. Then did you get the policy later on?

A. Yes, later on we got it.

Q. Who was it mailed to?

A. Mr. Hanney.

Q. Now, then, did you pay him a premium at that time?

A. I can't remember if we did. I think we did.

Q. Do you recall how much it was?

A. I think it was \$110.

Q. \$110? A. Yes. [49]

Q. By the way, were you fishing that fall, in 1941? A. The fall?

Q. The fall of '41 were you fishing?

A. Yes.

Q. When you are fishing, how long are you out for each time that you go out fishing?

A. Oh, we are about three weeks at a time.

Q. Then you come back to town?

A. Yes.

Q. Now, then, did you make any arrangement with Mr. Wheelock about having this policy of insurance, that has been offered here in evidence, and you read from, extended? A. Yes.

Mr. Stafford: Now, if your Honor please, I object to that as being immaterial. The Defendant has admitted that the policy was in effect.

Mr. Maloy: Well, I will tell you; to save time, Mr. Stafford, you can let the record show that there is an objection to every question I ask, and you can have an exception.

(Testimony of Hans Mikelsen.)

Mr. Stafford: I asked you to permit me to do that, Mr. Maloy, and you declined.

Mr. Maloy: You can have that running objection, if you want to, just to save time.

Mr. Stafford: I made that request and you declined.

Mr. Maloy: I didn't hear it, or I certainly would have granted it.

The Court: Let the record show that.

Q. (Mr. Maloy): Will you answer the question now, Mr. Mikelsen, about the extension? Did you make any arrange- [50] ments to have the policy extended from time to time?

A. Every 30 days.

The Court: May the Court ask this favor of counsel, however, this convenience of counsel, that if there is any new question raised to which there is an objection, under this arrangement, I wish you would advise the court of it.

Mr. Stafford: I would be glad to, your Honor; and, of course, it must be understood that the objection which is standing to these questions is the objection which was made in the absence of the jury.

The Court: Very well. I want to say at this time that that document the witness has been reading from, which he calls the insurance policy, I believe, or which has been referred to as such, is what has been received in evidence as Plaintiffs' Exhibit 1. It has already been admitted, and it is

(Testimony of Hans Mikelsen.)

being referred to as an instrument already before the jury and the court.

Mr. Maloy: I will say this for the benefit of the jury and the court, that I will read what I consider the material questions of the policy. I would like to read it to the jury at a later point in the trial.

The Court: Very well.

Q. (Mr. Maloy): Now, Mr. Mikelsen, before this personal property was in Locker 325 that was purchased by you and Mr. Hanney and Mr. Vohl from Henry Stakset, had you examined it?

A. Yes.

Q. When did you do that?

A. It were in July in '41. [51]

Q. Where did you examine it?

A. In the locker at 325.

Q. What condition did you find it in?

A. Very good condition; very good.

Q. Did you and Mr. Stakset make up an inventory at the time that you agreed to purchase it?

A. Me and Mr. Vohl, we went over everything and put it down, took an inventory, and then we took this list over to Stakset and he said, "That is right, that is what is in the locker."

Mr. Maloy: We have that inventory here as an exhibit to the Henry Stakset deposition, your Honor, that was taken by the defendant; Mr. Stakset's deposition having been taken at San Francisco. I wish to have, as a part of this witness'

(Testimony of Hans Mikelsen.)

testimony, this exhibit, which is the inventory, identified, and I would like to offer it.

The Court: Do counsel on both sides agree that that inventory now attached to the original of the Stakset deposition may be detached from there and marked Plaintiff's Exhibit 2?

Mr. Stafford: Yes, if your Honor please.

Mr. Maloy: Yes.

Mr. Stafford: The record should show that it has been so detached.

The Court: The list of property written with a blue typewriter ribbon on yellow paper, marked "De. of Stakset Exhibit No. 1, 10-18-44, K. G. Gagan, Reporter", has been by the court detached from the original deposition of the witness Henry Stakset on file in this case, and is now by the clerk marked Plaintiffs' Exhibit 2. [52]

(Whereupon, the inventory above referred to was marked Plaintiffs' Exhibit 2 for identification.)

Q. (Mr. Maloy): You have been handed, Mr. Mikelsen, Plaintiffs' Exhibit 2, a yellow piece of paper with a list of property on it. What is that exhibit? A. What?

Q. What is that? What is it?

A. This here?

Q. Yes.

A. That is the stuff that was in—the gear that was in the Locker 325.

Q. Is that the inventory that you and Mr. Stakset made up?

(Testimony of Hans Mikelsen.)

A. This is the inventory.

Q. Do you know whether Mr. Stakset signed the inventory at the time that you took over this personal property?

A. I can't remember, but I think it is.

Q. Look at the exhibit and see if you find his signature anywhere on it?

A. Oh, yes, here it is. This is his signature.

Q. And how about the second page?

The Court: The witness pointed to a signature on the lower right-hand corner of the front sheet.

Mr. Maloy: Of the inventory.

The Court: Of the first page.

Mr. Maloy: Plaintiffs' Exhibit 2.

The Witness: Yes.

Q. (Mr. Maloy): Do you find his signature on the second sheet also? A. Yes. [53]

Mr. Maloy: I will now offer Plaintiffs' Exhibit 2, your Honor, as an exhibit.

Mr. Stafford: May I have an opportunity to examine it?

Mr. Maloy: Sure.

Mr. Stafford: No objection.

The Court: Admitted.

(Whereupon, Plaintiffs' Exhibit No. 2 for identifiication was admitted in evidence.)

[Set forth as Exhibit B to the Complaint at p. 23, except that Exhibit B also shows weight and value.]

Q. (Mr. Maloy): Is there any webbing listed on that inventory, Mr. Mikelsen? A. Yes.

(Testimony of Hans Mikelsen.)

Q. What is webbing? Will you explain that to the jury?

A. Webbing is net, what we call netting, to make up the purse seine.

Q. Where was this webbing and this netting?

A. It was in Locker 325.

Q. How was it kept or preserved?

A. It was salted down in a big bin.

Q. Salted down? A. Yes.

Q. What is the purpose of salting netting down? A. So it isn't going to rot.

Q. To preserve it? A. Yes, preserve it.

Q. This was salted down, was it? A. Yes.

Q. Now, then, you say you and Mr. Vohl examined all of that personal property in there?

A. Yes, sir. [54]

Q. What was the condition of the webbing?

A. Very good.

Q. I believe there was some purse wire there too, wasn't there?

A. Yes, some purse wire that was brand new.

Q. Was any other part of that property brand new?

A. One bale of netting. I think it was about 160 fathoms long.

Q. And that, you say, was brand new?

A. Yes.

Q. Besides those two items that you identified in this list was there anything else brand new?

A. Some rope.

Q. What kind of rope?

A. Manila rope.

(Testimony of Hans Mikelsen.)

Q. How much did you pay Mr. Stakset for this personal property that was stored in the locker?

A. \$4,000.

Q. What was it worth at that time?

A. Oh, I should say——

Mr. Stafford: (Interrupting) Just a moment, if your Honor please. I object to that. I think the price that was paid is the best evidence of its value at that time.

Mr. Maloy: I have authority.

The Court: Is there a different rule in the case of personal property like this from that of real property?

Mr. Stafford: I know of no different rule.

Mr. Maloy: No, no different rule, your Honor.

[55]

The Court: An owner of real property is permitted to state what it was worth, the fair cash market value on the day in question.

Mr. Stafford: But the fair cash market value as of the day he bought it is not in question. The only fair——

The Court: Is that the basis of your objection?

Mr. Stafford: Yes. The only fair cash market value is——

The Court: When it was destroyed?

Mr. Stafford: When it was destroyed. We are not interested in what it was worth in September.

Mr. Maloy: Most assuredly, your Honor, an owner can always testify to the value of his property at any time. The Supreme Court of Washington has held that in several cases, the leading one

(Testimony of Hans Mikelsen.)

being Wickman vs. Allraun, 122 Wash., Page 546.

Now, there is also a continuing presumption. If you show the condition of property and the care that is given to it from one particular period of time, from one date, for instance, to another, and you show there is no difference in its condition, or you might show that because of a scarcity in the market it became more valuable, you would have a right to prove that also. All facts concerning the personal property—what was paid for it, the cost of replacement, what the owner believes it to have been worth, and the care that was given to it, its condition, and all those things, I expect to go into to show the condition of this property, and consequently its value. [56]

The Court: I think you would shorten it by indicating whether or not you propose to show its value was the same on the day it was lost as at some other time that this witness knows about.

Mr. Maloy: I expect to show it was worth more, your Honor, and I expect to show the reasons why it was [57] worth more.

The Court: By this witness?

Mr. Maloy: Yes, by this witness.

The Court: Well, the objection is sustained. The time of loss is the material time of value.

Mr. Maloy: Very well: I take an exception, please.

The Court: Allowed.

Q. (Mr. Maloy) Mr. Mikelsen, after you and

(Testimony of Hans Mikelsen.)

your partners acquired this personal property in Locker 325, where was it kept from then on?

A. The same locker.

Q. Was it destroyed by fire at any time?

A. Yes.

Q. When was that, do you remember?

A. '42; February in '42.

Q. In February, 1942?

A. I think it was in '42.

Q. They had a big fire, did they, down at the Salmon Bay Terminal? A. Yes.

Q. What was that property included in this list, in this inventory, worth on February 24, 1942?

A. It was worth about \$7,000.

Q. About \$7,000? A. Yes.

Q. When? In 1942? A. In 1941.

Mr. Stafford: I object to that, your Honor. The witness has already answered the question.

The Court: The objection is overruled. [58]

Q. (Mr. Maloy): Just go ahead and complete your answer.

A. In '41, when we took the inventory, it was worth about \$7,000.

Q. When? A. In '41.

Q. What was it worth on February 24, 1942?

A. Well, it cost us to get a new net around \$12,000.

Q. How much? A. Around \$12,000.

Q. \$12,000? A. Yes.

Q. What was this property that you lost in this

(Testimony of Hans Mikelsen.)

fire worth on February 24, 1942, when it was destroyed? A. I say it was worth \$12,000.

Q. It was worth \$12,000? Before the property was destroyed by fire, had you had any further conversations with Mr. Wheelock, the insurance agent, after the policy was issued in August, 1941?

Mr. Stafford: It is my understanding my objection goes to all this material.

Mr. Maloy: Oh, yes.

Q. (Mr. Maloy): Had you had any other conversations with Mr. Wheelock after the policy was issued? A. Yes.

Q. When?

A. When we come in from fishing we went up and talked to him, and he also want the insurance on the hull when the boat were completed.

Q. He was soliciting that from you fellows?

A. No, he didn't. [59]

Q. Well, did he ask you for it?

A. Yes, he did.

Q. Did you tend to any renewals of the insurance from time to time yourself personally?

A. Yes.

Q. Do you recall any particular occasion when you did?

A. I think it was in '42, in February, I went up and paid him a check so it won't run out, the insurance.

(Whereupon, a cancelled check, signed by Hans Mikelsen, dated February 24, 1942, was marked Plaintiffs' Exhibit 3 for identification.)

(Testimony of Hans Mikelsen.)

Q. (Mr. Maloy): You are being handed, Mr. Mikelsen, Plaintiffs' Exhibit 3. Will you look at it and tell the jury what it is? I say, will you look at Plaintiffs' Exhibit 3 and tell the jury what it is?

A. I didn't get you.

The Court: What is that?

Mr. Maloy: He doesn't understand me apparently.

Q. (Mr. Maloy): What is it you have in your hand, Mr. Mikelsen?

A. A check. The check I give Mr. Wheelock.

Q. And that is Plaintiffs' Exhibit 3? It has been marked Exhibit 3, hasn't it?

A. That is right.

Q. When did you give that to Mr. Wheelock?

A. In '42, February in '42.

Q. The day the check bears date?

A. The 24th.

Q. Now, did you have any discussion with him then in regard to the coverage provided for in the policy?

A. Every time I went up there—— [60]

Mr. Stafford (Interrupting): Just a moment, Mr. Mikelsen. Are you offering it in evidence?

Mr. Maloy: I will in just a moment.

Mr. Stafford: All right. Go ahead.

Q. (Mr. Maloy): Answer the question, please.

A. Every time I went up I asked him to be sure that everything is covered. "Sure; sure," he said, "it is covered."

(Testimony of Hans Mikelsen.)

Mr. Maloy: I will offer Plaintiffs' Exhibit 3, the check.

Mr. Stafford: The same objection I have been making to all this testimony.

The Court: The objection is overruled. Admitted.

(Whereupon, Plaintiffs' Exhibit 3 for identification was admitted in evidence.)

Q. (Mr. Maloy): What was the check given to Mr. Wheelock for?

A. It was given to him so that everything we had insured would be covered.

Mr. Stafford: Now, just a moment, if your Honor please. I move especially that that answer be stricken as not responsive.

The Court: If what is in his mind is what he said to Mr. Wheelock——

Q. (Mr. Maloy): Did you say that to Mr. Wheelock? What did you say to Mr. Wheelock?

A. I asked Mr. Wheelock, "Everything is covered so we are insured?" "Sure," he said, "everything is covered."

Mr. Maloy: May I read the inventory to the jury, your Honor?

The Court: Yes. I still have some doubt about the statement objected to. That objection is sustained and [61] that answer is stricken. The jury will disregard it. These last two answers that he made will stand.

Mr. Maloy: I am directing the jury's attention

(Testimony of Hans Mikelsen.)

to Plaintiffs' Exhibit 2. It is the inventory we have spoken of, and I would like to read it.

(Whereupon, Mr. Maloy reads Plaintiffs' Exhibit 2 to the jury.)

Q. (Mr. Maloy): Now, Mr. Mikelsen, was all of that property destroyed in that fire?

A. It was destroyed except two blocks, hand-made blocks.

Q. What are they? What do you mean by blocks? What are these, wood blocks?

A. It isn't wood blocks. They are made of iron.

Q. Oh, they are made of iron? A. Yes.

Q. What were the two you say that weren't destroyed? What about them?

A. I took them and I went over to the blacksmith at Fishermen's Dock and I asked him if he could use them; so he said, "If I were you, I wouldn't use them," but we have still got them aboard the boat. We haven't used them.

Q. You haven't been able to use them?

A. No, we haven't been able to use them. We have still got them.

Q. Now, all that property included in that inventory, is it all fishing gear and equipment?

A. All fishing gear.

Q. And when you and your partners bought it from Henry Stakset, what was your purpose in buying it from him?

A. To use it on this boat that we got built. [62]

Q. That is, the Hull No. 20?

A. That is right.

(Testimony of Hans Mikelsen.)

Q. After the fire, did you have any occasion or did you have any discussion—I will put it that way—with Mr. Wheelock, the insurance agent?

A. Yes.

Q. How long after the fire did you see him?

A. Oh, I would say about——

Mr. Stafford (Interrupting): Now, just a minute, if your Honor please. The running objection which has been going, as I understand, to all of this testimony, still goes as to this question; but there is the additional objection. Regardless of what contact this gentleman may or may not have had with Mr. Wheelock after the fire can't possibly affect the interpretation of this contract.

Mr. Maloy: That isn't the purpose of it at all, Mr. Stafford. The purpose of it is to show that Mr. Mikelsen discussed this question of the company's liability under this policy with the agent who wrote it.

Mr. Stafford: That is precisely the point, your Honor.

Mr. Maloy: And certainly we have a right to prove that.

The Court: You can tell what he said or did.

Mr. Maloy: That is right.

The Court: Try to use his own words without stating the effect thereof.

Mr. Maloy: Yes. What I want, of course, is for Mr. Mikelsen to say just what conversation he had.

(Testimony of Hans Mikelsen.)

Q. (Mr. Maloy): Now, you say you did have a conversation with [63] Mr. Wheelock after the fire?

A. Yes.

Q. Can you fix the time?

A. I would say about four or five days after the fire.

Q. Just tell the court and jury what you discussed and what you said and what he said.

A. I went up to him and I say, "Well, how about the money? We have got some money coming now from the insurance?" "Oh, yes, but you know," he said, "the insurance company is always slow paying, but I will do the best I can to get it for you."

Q. Did you hear any further from him about it?

A. No, I didn't hear. Then I went up again, and then there was a girl in the office, and she said she hasn't heard anything. Wheelock wasn't there at that time.

Q. You don't know the name of the girl, do you?

A. No.

Q. The girl worked there in the office?

A. Yes, I think so.

Q. That is, Mr. Wheelock's office?

A. Yes.

Q. Now, then, what else did you do towards collecting this money that you claim was due you under this policy?

A. Then later on, then Wheelock came down to Brown's Point and want to insure the hull, so I asked him about the money we have got coming.

(Testimony of Hans Mikelsen.)

Well, he said he hasn't heard anything yet, so when Mr. Vohl and Henry come over, I told them that there is no money yet, so we had better place the insurance with somebody else.

Q. What insurance? [64]

A. Hansen and Rowland.

Q. I mean what insurance do you refer to that you were going to place with somebody else?

A. The hull insurance.

Mr. Stafford: If your Honor please, I still insist that all of this material is immaterial.

The Court: This testimony about hull insurance, unless it has——

Mr. Maloy (Interposing): Well, I will connect it up, your Honor.

The Court (Continuing): ——unless it has some connection, it shouldn't be introduced.

Mr. Maloy: I will connect it up in just a moment.

The Court: Very well.

Q. (Mr. Maloy): Had Mr. Wheelock approached you with a view of soliciting the hull insurance? A. Yes.

Q. And you didn't write the hull insurance with him? A. No, I didn't.

Q. Who did you write it with?

A. Hansen and Rowland.

Q. What did you do next with a view to putting in a claim to the insurance company for your loss on account of this fire?

(Testimony of Hans Mikelsen.)

A. When Mr. Duren, the agent for Hansen and Rowland, come down to Brown's Point, and we were talking about the fire, I said, "We have got some money coming, but they seem to be slow paying." So he said, "Let me see your contract, the policy." So I showed him the policy. He said, "Well, it shows plain here. You can collect some money on this. [65] You have got the money coming," he said.

Q. What did you do?

A. Well, I gave the contract to him and I said, "Well, if you can do something for us, go ahead and do it."

Mr. Stafford: If your Honor please——

The Court: If he is reporting what somebody said in the absence of Mr. Wheelock about what rights he had on this policy, Plaintiffs' Exhibit 1——

Mr. Maloy (Interrupting): Yes, that would be hearsay.

Mr. Stafford: I move that the whole answer be stricken.

The Court: It is sustained.

Mr. Maloy: That last statement may be hearsay, of course, as to what he said and Mr. Duren said.

The Court: That is right. It is stricken, and the jury will disregard it wholly.

Mr. Maloy: Now, I will just state to Mr. Mikelsen, you can't tell what somebody else told you.

The Court: Other than Mr. Wheelock.

(Testimony of Hans Mikelsen.)

Mr. Maloy: Other than Mr. Wheelock.

Q. (Mr. Maloy): Now, what I want to get you to tell the jury, Mr. Mikelsen, did you appoint Mr. Duren or anybody else to take the matter of your claim up with the insurance company?

A. When the boat were completed and gone to Alaska, I told Mr. Duren, "You take care of this." He says, "Sure, I will take care of it for you."

Q. Do you know whether Mr. Duren did make a claim to the insurance company?

A. He told me when I came from Alaska——
[66]

Q. (Interrupting): Never mind. You can't state what he told you. Do you know whether he did make a claim or not? A. Yes.

Q. Your claim was turned down, wasn't it?

A. Yes, it was turned down.

Mr. Maloy: All right. I don't think of any other questions on direct at this time, your Honor, but I would like to reserve the right to recall the witness if I think of something I have overlooked.

The Court: You may have that right.

Mr. Maloy: I would like, however, to read certain portions of the insurance contract to the jury.

The Court: You may do that now.

(Mr. Maloy reads portions of Plaintiffs' Exhibit 1 to the jury.)

Q. Mr. Maloy: Now, Mr. Mikelsen—I do think of something I want to ask him now, your Honor. It will be very short, however.

(Testimony of Hans Mikelsen.)

Mr. Hikelsen, when you purchased this personal property from Mr. Stakset, did you have possession of Locker No. 325 in which is was stored?

A. Yes.

Q. Who gave you the key?

A. Mr. Fox. He got charge of the dock.

Q. Who is Mr. Fox?

A. He is the Port Captain.

Q. At the dock? A. At the dock.

Q. Did you get the key from him? [67]

A. Yes. Mr. Stakset told him to give us the key any time we wanted.

Q. Who had the control and possession of Locker 325 after you purchased this personal property from Stakset? A. We did.

Q. And who do you mean by "we"?

A. Mr. Hanney and Vohl and me.

Mr. Maloy: I don't think of anything else right now, your Honor. You may cross examine.

Cross-Examination

By Mr. Stafford:

Q. On what date was the keel of this Hull No. 20 laid, Mr. Mikelsen?

A. It was laid about the middle of August in '41.

Q. Do you know the exact date?

A. I couldn't remember the exact date. I couldn't.

Q. Up to that time there had been no work done on the construction of that boat at all, had there?

A. Well, they were working on planking and frames and so forth.

(Testimony of Hans Mikelsen.)

Q. There had been nothing done toward constructing it, had there? No construction started?

A. No.

Q. When was the first time you ever saw Mr. Wheelock? A. August 20.

Q. You are sure of that date? A. Yes.

Q. What makes you so certain of it?

A. We have got it in the policy. [68]

Q. Because that is the date of the policy?

A. Yes.

Q. Now, I think you said that you saw him in his office in the Insurance Building on that day?

A. Yes.

Q. Was that in the morning or afternoon?

A. Well, it is so long now I couldn't say, but it was the 20th. If it was the middle of the day or at night, I couldn't remember that.

Q. Who was with you? A. Mr. Hanney.

Q. You and Mr. Hanney? A. Yes.

Q. That is the first time you ever saw Mr. Wheelock in your life, isn't it? A. No.

Q. When had you seen him before?

A. I seen him before.

Q. When?

A. Well, that is another thing. I couldn't answer that, but I know Mr. Hanney pointed him out, "That is the fellow that got the war risk on the boat."

Q. The war risk?

A. I mean the builders risk.

(Testimony of Hans Mikelsen.)

Q. How long before that was that statement made? A. Well, I can't remember that.

Q. Well, would it be two months? Three months? A. No, it wasn't that long.

Q. Was it a month? About a month. [69]

Q. About a month? A. Yes.

Q. In other words, that would be about the middle of July? A. Yes.

Q. 1941? A. Yes.

Q. That Hanney pointed out Wheelock to you?

A. One time he walked down the street. He passed him, and Mr. Hanney said, "That is the fellow that got the policy."

Q. Got the builders risk insurance.

A. Yes.

Q. Is that all he said? A. Yes.

Q. You didn't have any talk with Wheelock then? A. No, I never spoke to him.

Q. So that the first time that you saw Wheelock to talk to was on August 20, 1941?

A. That is right.

Q. In his office? A. That is right.

Q. When did you first see the insurance policy from which Mr. Maloy was just reading?

A. August 20, 1941.

Q. You now have that policy which is marked Plaintiffs' Exhibit 1 before you. A. Yes.

Q. Now, you saw that policy first on August 20, 1941? A. Yes. He read it to us.

Q. Now, just a moment. Answer my question

(Testimony of Hans Mikelsen.)

and that will be sufficient. You first saw it on August 20, 1941? [70] A. That is right.

Q. And was it then as it is now in front of you?

A. No.

Q. What was the difference?

A. He haven't filled in this. He just read them clause.

Q. Pardon me?

A. He just read them clause what cover the boat.

Q. Then you didn't see that policy, then, on August 20, did you.

A. Well, it was the policy that he read to us, what we have got there.

Q. When did you first see that policy that is before you? A. August 20.

Q. And it was then in the condition it now is in?

A. No.

Q. Well, in what respect was it different?

A. About a month after he sent it to Mr. Hanney, and then Hanney showed it to me.

Q. Well, in what respect was the policy different when you saw it on August 20, 1942 from what it now is?

A. Well, all of this here wasn't filled in.

Mr. Stafford: May I come up to the witness stand?

The Court: Yes, you may, and counsel for the Plaintiffs may likewise approach the witness stand if he wishes to.

Mr. Maloy: I don't know if I need to at this time.

(Testimony of Hans Mikelsen.)

Q. (Mr. Stafford) What part was not filled in?

A. This here wasn't filled in.

Mr. Maloy: Except I would like to know what he is talking about. The jury can't get "this here" very well. [71]

The Witness: This wasn't filled in.

Mr. Maloy: You mean the blanks weren't filled in?

The Witness: No.

Q. (Mr. Stafford) You mean none of the type-writing was filled in? A. In here, no.

Q. None of the typewriting matter?

A. No.

Q. Was there any typewriting on the one you saw on August 20 at all?

A. I didn't pay no attention. He did read these clauses——

Q. (Interrupting) No, I am not asking you what he read. I am asking you what you saw on that day.

A. I saw this policy, but not this.

Q. None of that was filled in?

A. That wasn't filled in.

Q. Did you see this policy on that day? Did you see any of these papers on that day?

A. No, I didn't see them papers.

The Court: Referring to what?

Mr. Stafford: The attached endorsements. They are all part of Plaintiffs' Exhibit 1.

The Witness: I didn't see them.

(Testimony of Hans Mikelsen.)

Q. (Mr. Stafford) Then the only paper which you saw on that day was this paper?

A. Yes.

Q. This one sheet entitled "Builders Risk, Form 50 Amended", and nothing filled out in it?

A. There was nothing filled out here.

Q. So that what you saw was a form similar to this? [72] A. Yes.

Q. And you did not read it?

A. No. He did it for us.

Q. And he only read three clauses to you?

A. He read all the clauses.

Q. All of them? Did he read all of this to you?

A. No, he did read the clauses what include——

Q. (Interrupting): Just a moment. I am asking——

Mr. Maloy (Interrupting): Let him complete his answer. Don't interrupt him.

Mr. Stafford: I am asking him to complete his answer and then stop, Mr. Maloy.

Q. (Mr. Stafford): You testified on direct examination that he read three clauses from this form to you? A. Yes.

Q. Now, that is all that you know about that paper as of August 20, 1941, isn't that correct?

A. He did read the clauses,——

The Court (Interrupting): Now, you can resume your station.

Q. (Mr. Stafford): When did you next see the policy, Mr. Mikelsen?

(Testimony of Hans Mikelsen.)

A. Mr. Hanney keep the policy after that.

Q. When did you next see it?

A. I didn't see it before, oh, it was in Tacoma when this here fire, then——

Q. (Interrupting): You didn't see it again until after the fire, did you?

A. No, I didn't see it.

Q. In other words, you never did see it before the fire in [73] its present form, did you?

A. Well, he did read all this to us and what covered us, and then he sent it to Mr. Hanney.

Mr. Stafford: I move that the answer be stricken, if your Honor please.

The Court: It is stricken.

Mr. Stafford: On the ground that it is not responsive, and I will ask the court to ask the witness to answer my question.

The Court: Just keep your mind on the form of the question.

Q. (Mr. Stafford): You never did see that policy until after the fire, then, in its present form, did you? A. Yes.

Q. When?

A. I saw it up to Wheelock's office.

Q. Was it all filled out at that time?

A. No.

Q. Did you see it all filled out before the fire?

A. Yes.

Q. When?

A. It was about a month after Mr. Hanney got it from Wheelock.

(Testimony of Hans Mikelsen.)

Q. When was that?

A. About a month. In September?

Q. You saw it in September?

A. Yes.

Q. Where was that?

A. I think it was at Oluf Hanney's house.

Q. You think it was up at Hanney's house?

A. Yes. [74]

Q. Did you read it at that time?

A. Yes, we did read it, both of us.

Q. Both of you read it at that time?

A. Yes.

Q. That was in September, 1941?

A. '41.

Q. When did you buy this material from Stak-set?

A. We bought the material in—we were talking about it in——

Q. (Interrupting): No, never mind that. Now, I want to know when you bought it.

A. We bought it in August, '41.

Q. What day of August?

A. Well, I would have to go back and look in the book for that.

Q. Did you pay for it? A. Yes.

Q. Hanney didn't pay for it?

A. Yes, we all paid.

Q. How did you pay for it?

A. In checks.

Mr. Stafford: Did you bring those checks, Mr. Maloy?

(Testimony of Hans Mikelsen.)

Mr. Maloy: No, I don't believe I did.

Mr. Stafford: I demanded their production at the trial.

Mr. Maloy: Yes, I understand, but I don't think I have those checks. Have you those checks, Mr. Mikelsen, the cancelled checks?

The Witness: I don't know if we have got them, but I can get them for you.

Mr. Stafford: Can you produce them here tomorrow [75] morning?

The Witness: I think so.

Mr. Maloy: If they are available he can produce them. I don't know whether he has them.

The Court: He thinks he can.

Mr. Maloy: He will try to. I will say that for him. I will try to see to it that he does bring them here if they are in existence. I didn't know there was any argument about whether they were paid for or not. The stuff was paid for. Mr. Stakset testified in his deposition that he was paid in full.

Q. (Mr. Stafford): Now, you say that after this fire you saw Mr. Wheelock? A. Yes.

Q. On what day was that?

A. I can't remember the date, but I know that it was four or five days after the fire.

Q. And then you stated that you went back sometime later and Wheelock wasn't there?

A. Yes.

Q. When was that?

A. Oh, that must have been maybe 10 days after.

(Testimony of Hans Mikelsen.)

Q. Are you quite sure about that, about 10 days after?
A. Yes.

Q. That would be about 15 days after the fire?

A. Yes, about 15 days after.

Q. That is when you saw this girl?

A. Yes.

Q. Was there more than one girl in the room?

A. No, I don't think so. [76]

Q. What time of the day was that?

A. Well, I couldn't exactly say the minute I was there, but——

Q. (Interrupting): Approximately?

A. I think it was in the middle of the day.

Q. So that that would be about the 10th of March, 1942, wouldn't it?
A. Yes.

Q. That you called at Wheelock's office, he wasn't there and you talked to the girl?

A. Just about, yes.

Q. You do not remember the girl's name?

A. No. I just asked her if Wheelock was in, and if they heard anything about our money. She said "No", they hadn't heard anything.

Mr. Stafford: Of course, the latter part of that answer I move be stricken, your Honor, as not responsive. I didn't ask him about that.

The Court: Yes.

Mr. Maloy: I think I was very responsive to the question that was propounded.

The Court: Read both the question and the answer.

(Testimony of Hans Mikelsen.)

(Whereupon, the question and answer there-
to were read by the reporter.)

Mr. Maloy: What is not responsive about that?

Mr. Stafford: I asked him if he knew the girl's
name, so he goes on with a speech about coverage.

The Court: The objection is sustained. It is
stricken. The jury will disregard it.

Mr. Stafford: I don't think I have any further
[77] cross examination.

Mr. Maloy: No further questions.

The Court: You may be excused.

(Witness excused.) [78]

Mr. Maloy: I will call Mr. Hanney.

Mr. Stafford: Before the examination of Mr.
Hanney begins, your Honor, I want it noted that
the same running objection, which was permitted
by agreement of Counsel to the testimony of Mr.
Mikelsen, remain running against similar testimony
of Mr. Hanney.

The Court: Have you any objection?

Mr. Maloy: I have no objection to the record
showing that Mr. Stafford would object to every
question that I would ask this witness.

Mr. Stafford: All except his name and address.

The Court: You may proceed.

OLUF B. HANNEY,

one of the Plaintiffs, called as a witness herein,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your full name and address? A. Oluf B. Hanney.

Q. Where do you live?

A. 7740 - 12th Northwest.

Q. How long have you lived there, Mr. Hanney?

A. Oh, about four years.

Q. Where did you live prior to that?

A. Oh, several places. Alaska and California and sometimes Seattle.

Q. What has been your business the last twenty years or so? A. Fishing. [86]

Q. Where have you engaged in such fishing operations?

A. Oh, Alaska, Seattle, and California coast, along the coast.

Q. What kind of fishing have you been engaged in? A. Halibut and sardines.

Q. Have you been interested in or owned fishing boats from time to time? A. Yes.

Q. What kind of boats?

A. Fishing boats, halibut boats, sardine boats.

Q. Are they wooden boats?

A. Wooden boats.

Q. In the spring of 1941 were you interested in the building of a boat over at Brown's Point?

A. Yes.

(Testimony of Oluf B. Hanney.)

Q. Who was interested with you?

A. Mr. Mikelsen and Mr. Vohl.

Q. When did they become interested with you?

A. Oh, in about August, I think it was. The first of August or so.

Q. In what year? A. In 1941.

Q. Do you remember when the keel was laid for that boat?

A. No, I do not. It was around the middle of August.

Q. Along in August?

A. Along the middle of August.

Q. Before August, before the keel was laid, had you met or became acquainted with Mr. Wheelock? A. Yes.

Q. The gentleman that sits here with the iron gray hair and [87] glasses?

A. That is right.

Q. When did you first meet him?

A. Oh, I met him in the spring of 1941.

Q. In connection with what?

A. With the boat.

Q. What about the boat? A. The bond.

Q. The bond? A. Yes.

Q. Performance bond? A. Yes.

Q. Did he write it for you? A. Yes.

Q. Did you have any discussion with him at that time concerning any other kind of insurance?

A. Well, the boat was builder's risk.

Q. Builder's risk? A. Yes.

Q. That was in the spring, you say, of 1941?

(Testimony of Oluf B. Hanney.)

A. Yes.

Q. He did not write any builder's risk insurance at that time, though, did he?

A. No. There was no need of it then.

Q. No. When did you discuss with him next any matter pertaining to builder's risk insurance?

A. Well, that was in August when they started to build the boat.

Q. You said both of us. Who do you mean by both of us?

A. No, I say when they started to build the boat we talked [88] about it.

Q. Who talked about it?

A. Mikelsen and I and Mr. Vohl.

Q. Did you talk to Mr. Wheelock about it in August 1941? A. Yes.

Q. Where did the talk take place?

A. In his office.

Q. Whose office?

A. Mr. Wheelock's office.

Q. Where was that office, do you recall?

A. It was on Second Avenue. The Insurance Building.

Q. Now, did you tell Mr. Wheelock what your plans were at that time, what you wanted to do?

A. Yes.

Q. Just tell the Court and the jury what conversation took place at the time that you and Mr. Mikelsen were up at his office?

A. Well, we had this boat to be built, and we also had supplies other places.

(Testimony of Oluf B. Hanney.)

Mr. Stafford: I move that this answer be stricken. If he testifies to what was said——

The Court: (Interrupting) He can say what was said. Do not comment upon what somebody else thought or intended.

Q. (By Mr. Maloy) Just what you said to Mr. Wheelock, please, Mr. Hanney, about the builder's risk.

A. That we may buy stuff other places which would not be used at a certain time to build the boat. He said, "Well, whatever you buy is insured. Whether you have it [89] in Tacoma or Seattle or any place else, it would be insurance." So I said, "All right."

Q. Did you discuss with him anything about buying Mr. Stakset's fishing gear and equipment?

A. Well, it was along in August we did, yes.

Q. What did you tell Mr. Wheelock about buying any of Mr. Stakset's equipment and fishing gear?

A. He said that it would be insurance as well in Seattle as it would be in Tacoma.

Q. Did you have a form of policy before you at the time?

A. I had the policy—yes, he showed us the policy. We went over that policy several times.

Q. Well, now, was the policy written up at that time or later?

A. It was written out in August and mailed to me. I didn't get it for about three or four weeks after.

(Testimony of Oluf B. Hanney.)

Q. Where was it mailed to?

A. It was mailed to my home in Ballard.

Q. To your home?

A. Or at a place I lived, yes.

Q. What policy did you have before you that you went over, you said, a minute ago? What policy was that?

A. That was the builder's risk insurance.

Q. Did he read any particular portions of it to you?

A. Yes. We went over this, several of those things, and he showed me, he says, "Here it is. Your stuff is covered right here."

Q. Do you think you would be able to pick out some of the clauses that he read to you on that occasion? A. I think so. [90]

Q. Will you look at the policy, Plaintiffs' Exhibit No. 1, Mr. Hanney, and point out or read to the jury any clauses that you find which you say that he read to you upon that occasion?

A. Well, he has these two here that he read, that I remember he read, because we know we had this stuff.

Q. Well, read the first clause.

Mr. Stafford: I move that that answer be stricken.

Mr. Maloy: I think that is perfectly responsive.

The Court: Repeat the question and read the answer.

(Whereupon, the question and answer thereto were read by the reporter.)

(Testimony of Oluf B. Hanney.)

The Court: The objection is overruled.

Q. (By Mr. Maloy) Now, will you read those clauses that you say that he read to you? Read them to the jury.

A. Well, here is one: (Reading) "On hull, tackle, apparel, ordnance, munitions——"

The Court: (Interrupting) Mr. Hanney, you will have to read more slowly, and do your best to be distinct.

Q. (By Mr. Maloy) Read a little more distinctly.

The Court: In your pronunciation.

A. (Reading) "On hull, tackle, apparel, ordnance, munitions, [91] artillery, engines, boilers, machinery, appurtenances, including plans, patterns, molds, boats and other furniture and fixtures, and all material belonging and destined for Halibut Boat Hull No. 20."

Q. (By Mr. Maloy) Did he read any other clauses to you, and if so, will you please read it to the jury?

A. Well, he read this one down here.

Q. Go ahead and read it, Mr. Hanney.

A. (Reading) "This insurance is also to cover all risks, including fire, while under construction, and/or fitting out, including materials in buildings, workshops, yards and docks of the assured," —I don't understand this here.

The Court: He says he doesn't understand it.

Q. (By Mr. Maloy) You don't understand a word there?

(Testimony of Oluf B. Hanney.)

A. I don't understand it. I can't see it. The next one is pontoons, rafts, wherever she may be laying, and all risk or loss or damage through collapse of supports or ways, from any cause whatever, and all risks of launching.

Q. Were there any other clauses of that policy or that form that he read to you at that time?

A. Well, we went over it so many times, several times.

Q. Do you recall of any other clauses?

A. I recall those two pretty well.

Q. What?

A. I recall those two pretty well because those was the main things.

Q. Did you have any conversation with him at that time re- [92] garding any of this personal property in the locker down at the Salmon Bay Terminal?

A. Yes.

Q. What did you tell him about it?

A. Well, we told him we had it there.

Q. Did you say anything to him about wanting to insure it?

A. Well, he showed us—he pointed out that it was already insured.

Q. How do you mean, he pointed out? By reading those clauses?

A. By reading those clauses, by showing us those clauses.

Q. And said you were insured? A. Yes.

Q. Now, he didn't deliver or issue the policy to you at that time, did he? A. What?

(Testimony of Oluf B. Hanney.)

Q. I say, he didn't issue and deliver the policy to you at that time?

A. No, not at that time. He sent it to us.

Q. Now, who had the key or the possession and control of this personal property in this locker?

A. Mr. Mikelsen and Mr. Fox, I believe it is.

Q. By Mr. Fox, you mean the custodian down there at the Salmon Bay Terminal?

A. Yes, the Salmon Bay Terminal.

Q. He is the custodian down there?

A. Yes.

Q. Or was, anyway?

A. He is the boss. He takes care of the dock.

Q. Did anybody else have any right of access to this locker [93] 325 other than you and Mr. Vohl and Mr. Mikelsen? A. No.

Q. Did you inspect this equipment and fishing gear that was in Locker 325 before you purchased it from Stakset?

A. Mr. Mikelsen and Mr. Vohl did.

Q. They did, but you didn't? A. No.

Q. Did that stuff remain there in the locker until the fire? A. Yes.

Mr. Stafford: If he knows. I thought he said he didn't see it.

Mr. Maloy: Well, he didn't see it before they bought it.

Q. (By Mr. Maloy) Do you know whether or not the fishing gear and equipment which you purchased from Mr. Stakset remained in the locker

(Testimony of Oluf B. Hanney.)

from the time you purchased it to the time of the fire? A. Yes, it remained there.

Q. You didn't take any of it out? A. No.

Q. What happened to it in February 1942?

A. 1942? It burned up.

Q. It burned up? It became a total loss?

A. Yes.

Q. Did you at any other time, other than this time in August 1941, and after this policy was issued, have any occasion to discuss the policy with Mr. Wheelock?

A. Well, we were up there from time to time to be sure that it was insured, but I could not say exactly the [94] exact date.

Mr. Stafford: I object to that, your Honor, as not responsive. He was asked if he discussed this after the policy was written with Mr. Wheelock.

Mr. Maloy: I think he answered. He said that he had been up there, but he didn't remember just exactly what they discussed, to see if it was insured.

Mr. Stafford: I wish the reporter would read the answer.

The Court: All right, read the answer.

(Whereupon, the answer was read by the reporter.)

Mr. Maloy: I think that is perfectly responsive.

Mr. Stafford: He was asked if he talked to Wheelock. I maintain that answer is not responsive to that question, and I move to strike it.

(Testimony of Oluf B. Hanney.)

Mr. Maloy: I am certainly going to object to the motion to strike, because I think it is responsive.

The Court: If the Examiner wishes to leave the answer incomplete, I would say, rather than unresponsive, that it is incomplete. The objection is overruled.

Q. (By Mr. Maloy) You say you were up there at Wheelock's office from time to time. What were you up there for?

A. I was up there to be sure that the boat was——

Mr. Stafford: (Interrupting) Now, if your Honor please, I am objecting to that.

The Court: You can ask him what he talked [95] about or what he did, but you can't have him state what was in his mind as the purpose of being there.

Mr. Maloy: I think he can testify as to what his intent was.

The Court: The objection is sustained. You can ask him what he did and what he said, and what the other gentlemen said or did.

Mr. Maloy: Well, your Honor, I have several decisions from our Supreme Court where they hold that a person can testify what his intention was in doing anything.

The Court: Disconnected from his acts?

Mr. Maloy: Yes, your Honor. He can testify as to what his intention was.

The Court: This objection will be sustained.

(Testimony of Oluf B. Hanney.)

Mr. Maloy: Exception. I would like to present that authority tomorrow morning to your Honor.

The Court: The exception is allowed, and I will try to find some time to hear the argument further, if you would like.

Mr. Maloy: It won't take long, because it is a very well laid down rule. There is a unanimity of authority on it.

Q. (By Mr. Maloy) Mr. Hanney, was this policy renewed from time to time? A. Yes.

Q. Who took care of the renewals of you three that owned this personal property which was destroyed? A. Mr. Wheelock. [96]

Q. Yes, I know; but which one of you, Mr. Vohl or Mr. Mikelsen or yourself, or did all of you look after renewing it?

A. We all looked after it. Mikelsen and Vohl was the ones that looked after it. They were here in the spring?

Q. Where were you?

A. I was out fishing. I was here from time to time, but I was out fishing most of the time.

Q. But they were here? A. Yes.

Q. Mr. Vohl and Mr. Mikelsen, so they looked after it, is that the idea?

A. That is the idea.

Q. How much did you fellows pay Henry Stakset for this fishing gear and equipment?

A. \$4,000.

Q. Do you know what happened to Mr. Stakset's vessel, the Midnight Sun?

(Testimony of Oluf B. Hanney.)

A. The Government took it over after the war.

Q. After the war commenced?

A. After the war commenced.

Mr. Stafford: I move that that answer be stricken. He was asked did he know what happened to the boat.

Mr. Maloy: Well, he answered the question, so he must have known.

The Court: The objection is overruled.

Mr. Stafford: Well, if your Honor please, there is no showing that he personally knows anything about where that boat went. [97]

The Court: If you find on cross examination that he didn't, the Court will strike it; and I can do it then just as well as now.

Mr. Maloy: You may cross-examine.

Cross Examination

By Mr. Stafford:

Q. When did you first meet Mr. Wheelock, Mr. Hanney?

A. In the spring of 1941.

Q. What month of that year?

A. I don't quite remember now.

Q. Pardon me?

A. I don't quite remember that.

Q. Was it the same month that the contract was written up for the building of the boat?

A. No, it was before that. That was at the time when we took this bond. In May, I think it was.

(Testimony of Oluf B. Hanney.)

Q. Will you refer to the last page of that document which is marked Defendant's A-1, Mr. Hanney. The last page of it, please. No, the last page. The last page. Is that your signature?

A. Yes.

Q. Where did you sign that? I mean, when did you sign it? A. Where I signed it?

Q. When did you sign it?

A. We signed it over at Brown's Point.

Q. You signed that over at Brown's Point?

A. At Brown's Point, yes.

The Court: Let the record show that Counsel [98] examining is referring to Defendant's Exhibit A-1, which has already been received and admitted in evidence.

Q. (By Mr. Stafford) When did you sign it at Brown's Point, Mr. Hanney?

A. Well, doesn't the date show here when I signed it?

Q. I am asking you if you recall when you signed it?

A. That was during the winter, in 1941.

Q. During the winter?

A. During the spring, yes.

Q. What month?

A. Well, I don't remember that.

Q. You don't know what month you signed that contract?

A. No, I don't remember that.

Q. Would it be earlier than May, do you think?

A. It might have been.

(Testimony of Oluf B. Hanney.)

Q. Could it have been later than May?

A. No, I don't think so.

Q. You are sure it wasn't later than May, but it might have been earlier? A. Yes.

Q. Who was present when you signed it?

A. Peterson.

Q. Who else?

A. His daughter. She was taking care of the office?

Q. His daughter? A. Yes.

Q. And who else?

A. I don't think there was anyone else.

Q. You and Mr. Peterson and his daughter?

[99]

A. Yes.

Q. The other signatures on that, then, is Mr. Peterson's, which you saw put on it?

A. The other one is Mr. Peterson. The other ones is mine.

Q. Well, you remember Mr. Mikelsen testifying that on August 20, 1941 you and he went to Wheelock's office? A. Yes.

Q. At which time Wheelock read from a policy?

A. Yes.

Q. Is that the policy that you had before you there, from which you were reading a few minutes ago?

A. That is something similar to it, but it may not be the same policy.

Q. Well, do you know whether it was or was not the same policy?

(Testimony of Oluf B. Hanney.)

A. Yes, it was the same policy.

Q. And it was all filled out at that time?

A. No, it was not filled out.

Mr. Stafford: May I approach the witness, your Honor, with that exhibit?

The Court: Yes, you may, and opposing Counsel likewise.

Q. (By Mr. Stafford) Handing you Plaintiff's Exhibit 1, Mr. Hanney, which is the insurance policy in this case, I will ask you when you first saw that policy as it is now written?

A. In August.

Q. Then it was just like that when you saw it on August 20?

A. I don't know. I can't recall. [100]

Q. I am asking you when, to your best recollection,——

A. (Interrupting) The first time I saw it was when he mailed it to me home.

Q. That is the first time you saw that policy, is when you received it at your home?

A. Yes.

Q. And that was when?

A. That was about the first of September.

Q. So that the policy from which you say Wheelock read to you in his office on August 20, 1941,——

A. (Interrupting) We had copies of it a couple times at Mr. Wheelock's office after that.

Q. Now, just a minute. We are not talking about after that. On August 20, 1941, the form

(Testimony of Oluf B. Hanney.)

from which you say Mr. Wheelock read to you was not the policy you have in front of you, was it?

A. It looks very much the same thing to me.

Q. You didn't read it on August 20, 1941 at all, did you? A. Part of it, yes.

Q. You personally read it at that time?

A. Some of it.

Q. Or did Wheelock read it to you?

A. Mr. Wheelock read it to us.

Q. You never read any part of it at that time, did you? A. No.

Q. But you do know that none of that type-written matter was in what he read from, don't you? A. I didn't get that.

Q. Your name wasn't on the paper he read from on August 20, was it? [101]

A. No, I don't think so.

Q. So that the first time you ever saw that policy was sometime in the month of September, 1941? A. Well, probably it was.

Q. And that is when you received it by mail at your home? A. Yes.

Q. It was then that you and Mikelsen sat down and read it, wasn't it?

A. Well, we went over it with Mr. Wheelock after that.

Q. Now, just a moment. One thing at a time. When you received it at your home, you and Mikelsen sat down and read it, didn't you?

A. That is right.

(Testimony of Oluf B. Hanney.)

Q. Who drew the contract that was signed by you and Peterson, Mr. Hanney?

A. I think the girl in the office.

Q. Peterson's daughter? A. Yes.

Q. You are sure of that?

A. Pretty sure, yes.

Q. Well, are you positive of it?

A. No, I am not positive, because he was the one that had it.

Q. Now, wait a minute. I didn't understand that last part. You say Mr. Peterson was the one that had that contract drawn? A. Yes.

Q. You didn't have anything to do with having it drawn? A. No.

Q. And it was typed over at Mr. Peterson's office, is that [102] right?

A. I presume it was.

Q. Pardon me?

A. Yes, I guess it was. Anyway, he had it there in the office ready for me when I come over there.

Q. And you never saw it before?

A. I never saw it before I come there, no.

Q. What did you do with it then, after you got it?

A. What I done with it after I got it?

Q. Yes. A. I kept it.

Q. Did you show it to anybody?

A. That I don't know. I don't think so. I might have. I showed it to Mikelsen and Vohl, yes.

(Testimony of Oluf B. Hanney.)

Q. Are they the only ones you ever showed it to? A. That I don't know.

Q. Well, try and remember.

A. Well, I am trying to. I don't know. It is a long time ago. That is three or four years—three years ago.

Q. When did you first talk to Wheelock about insurance on this vessel?

A. That was right after we took that bond.

Q. Right after you took the bond?

A. Or at the same time.

Q. All right. Where did you take the bond? Where did you talk to him?

A. Where we talked to him?

Q. Yes.

A. In a fellow by the name of Landon's office.

Q. A fellow by the name of Landon? [103]

A. Yes.

Q. Who was Landon?

A. He is an attorney in this town.

Q. He was your lawyer in this matter, wasn't he? A. No.

Q. He didn't advise you on it with respect to this contract at all? A. No.

Q. And you didn't meet Wheelock in Landon's office, did you?

A. That is where I met him, yes.

Q. And it was there that you gave Wheelock the order for the performance bond and for the builder's risk insurance, wasn't it? A. Yes.

(Testimony of Oluf B. Hanney.)

Q. Now, that was in May of 1941, wasn't it?

A. I think it was, yes.

Q. Now, when was the next time you saw Wheelock?

A. Oh, I saw him several times probably after that. Maybe two or three times after then.

Q. When was the next time after that?

A. That I am not so sure.

Q. It was August 20, wasn't it?

A. I saw Mr. Wheelock before then.

Q. You saw Mr. Wheelock before that?

A. Yes.

Q. When was it?

A. Oh, I will say the first of July.

Q. Did you have any talk with him?

A. Yes. [104]

Q. What about?

A. About the insurance.

Mr. Stafford: I don't think I have any further questions.

Mr. Maloy: That is all, Mr. Hanney.

The Court: You may step down.

(Witness excused.) [105]

Mr. Maloy: Step forward, Mr. Duren.

H. T. DUREN,

Called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your name and your residence and business?

A. My name is H. T. Duren, and my residence is Tacoma, Washington, and my business is marine insurance.

Q. With what concern are you connected in the marine insurance business?

A. Hansen & Rowland.

The Court: May I ask the witness to spell his last name?

The Witness: (Spelling) D-u-r-e-n.

Q. (By Mr. Maloy): How long, Mr. Duren, have you been in the marine insurance business?

A. Seventeen years.

Q. Have you been with Hansen & Rowland during all that period of time? A. No.

Q. How long have you been with Hansen & Rowland? A. 13 years.

Q. Are you acquainted with Oluf B. Hanney, one of the Plaintiffs? [118] A. Yes.

Q. Are you acquainted with Hans Mikelsen, another of the Plaintiffs? A. Yes.

Q. And are you acquainted with Paul Vohl, another plaintiff? A. Yes.

Q. Were you acquainted with them in the early part of the year 1942? A. Yes.

(Testimony of H. T. Duren.)

Q. Mr. Duren, state whether they or either of them came to you at any time after February 24, 1942, in connection with presenting a claim on their behalf to the Franklin Fire Insurance Company?

Mr. Stafford: Just a moment, if your Honor please. The Defendant objects to the testimony called for by that question on the ground, first, that the policy and the construction contract and the admissions of record, which are now part of the record of this case, leave no ambiguity requiring explanation by parol evidence; second, because the evidence offered or called for by this question, even if admissible against the objection just stated, would not be material, relevant or competent in connection with the matters to be considered at this trial. In other words, my point on that last objection is that after the fire on February 24, 1942 had occurred, any action by the Plaintiffs could not possibly be material, relevant or competent to prove what the intention was in writing a policy which was issued on August 20, 1941, and particularly no transaction they may have had with Mr. Duren can conceivably relate to the question of intent at that [119] time.

The Court: Do you wish to make a statement, Mr. Maloy?

Mr. Maloy: Well, I didn't hardly believe it was necessary, but the purpose of this, of course, is to show that these men, after the fire,—

(Testimony of H. T. Duren.)

Mr. Stafford (Interrupting) Now, just a moment, Mr. Maloy. I don't think that a response to my objection calls for an offer of proof.

Mr. Maloy: I am not making any offer of proof. I am trying to advise the Court of our position in regard to the evidence which we are about to offer.

Mr. Stafford: I think that the objection can be responded to without going into the evidence to be offered by this witness.

The Court: The jury will temporarily retire.

(Whereupon, the jury retired to the jury room, and the following proceedings occurred without their presence and without their hearing:)

Mr. Stafford: I would like to be heard further.

The Court: I will hear you further. Have you any decisions of the State Supreme Court, or——

Mr. Stafford: I have no decisions on this point whatever. I don't think any are necessary, but I shall have Mr. Taylor prepare them if you think they are.

But here is my whole point, if your Honor please. [120] We, of course, are not relinquishing our position that there is no ambiguity and there is no requirement for parol evidence, but it is not to that objection that I am addressing these remarks.

My second objection is that, even assuming that the Court rules against me on my first objection

(Testimony of H. T. Duren.)

and holds that there is an ambiguity here which does require explaining by parol evidence, that this parol evidence, the evidence called for by this question, cannot possibly be admissible.

Why? If we have anything to try here, apart from the amount of damages—and I don't concede that we have—but if we have, it is the question of what constituted the subject matter of this policy. As Mr. Maloy puts it, what was the intent of these people?

Now, that can only mean what was the intent of these people at the time the policy was written.

All right. The policy is written, Hanney, Mikelsen and the policy itself all say on August 20, 1941. This gentleman has already stated, and Mr. Maloy's question asks what was done after February 24, 1942. By whom? By Hanney and Mikelsen with Duren.

Now, how in the world, if you Honor please—how, by any stretch of the imagination can a unilateral act by Hanney and Mikelsen, with a stranger to the entire transaction, have any competent or relevant or material bearing on the issue of what the intent of these parties was in August of 1941?

At most it can be a self-serving proposition. At most they can prove that Hanney and Mikelsen—and Mr. [121] Maloy indicated that in his opening statement—went to Duren, and Duren wrote a letter demanding payment.

Well, at the very most that is self-serving and objectionable on that ground only.

(Testimony of H. T. Duren.)

The Court: Now I will hear from the other side.

Mr. Maloy: Now, if it please the Court, let us suppose that the Plaintiffs had never presented any claim against the insurance company on this loss until they started suit. What would be the inference? It would be the inference that they didn't think they had any claim.

Now, this evidence is relevant to show their attitude, their conduct, their construction after the conversations which they have testified to regarding the issuance of the policy, and after the loss by fire, by first taking up with their insurance agent, Mr. Duren, who had become such, which will be shown, to present and write a letter or take it up with The Franklin Fire Insurance Company and see whether the insurance company was going to adjust this loss or pay this loss.

Now, that certainly corroborates and is relevant to corroborate the plaintiffs in their position that they have taken that there is liability under this policy and that this property was covered.

The Courts hold and the authorities hold uniformly that the acts and conduct of all the parties concerning the transaction are admissible.

Now, it also gives rise to an inference that what they have heretofore testified to in regard to the issuance of the policy and the coverage effected thereby [122] is the correct viewpoint and the facts of the matter.

The Court: Do you expect to have this witness

(Testimony of H. T. Duren.)

relate here on the witness stand before the jury what he told them?

Mr. Maloy: No, your Honor, I don't intend to go into any hearsay.

My question, if it please the Court, is directed as to whether they did come to him. Now, there can't be any hearsay on that. I am not asking what they said to him.

The Court: And did he take any action?

Mr. Maloy: Yes, he did. He took action.

The Court: I mean to say, do you intend to go further and ask him what if any action he took at their request?

Mr. Maloy: Exactly so, your Honor, and he took it up with the insurance company; and I want to prove what the insurance company did about it and the position of the insurance company now.

Now, as long as the jury is not present, I will just state further, I am not going to make this contention that the position they took constitutes a waiver or estoppel precluding them from taking the position they now take in this trial, because of a clause in their letter where they have made a reservation to the effect they could take any other position they wanted to; but I am sure your Honor is familiar with the rule of law that where an assured, after loss, makes a claim or presents proof of loss to the insurance company, and the insurance company denies liability on one ground, [123] they are estopped to deny on any other

(Testimony of H. T. Duren.)

ground, without a specific reservation. That is uniformly a well known law.

Now, we will show by this correspondence that Mr. Duren in a letter dated June 8 wrote The Franklin Fire Insurance Company presenting a claim and asking for adjustment on behalf of the Plaintiffs, and that the Fire Insurance Company on June 18, ten days later, wrote a letter to Hansen and Rowland attention of Mr. Duren, in which they denied liability on a ground that they do not insist upon at all at this time.

Now, certainly that is material for the consideration of the jury.

Mr. Stafford: Now, Mr. Maloy, that is exactly why I wanted the jury excused. You have conceded that the rule about a restricted denial of liability has no application in this case; yet you are trying to back that rule into this case and get it to the attention of the jury, and that is precisely why this question is very important.

The fact is, the letter that Mr. Maloy has referred to was written by The Franklin Fire Insurance Company Manager here, Mr. Cochrane, to Mr. Duren, and it very carefully stated that we do not regard—I am not attempting to quote it, but Mr. Maloy will agree that this is the substance, and he has it with him right there—we do not believe that this loss constitutes any claim under this policy, and we therefore reserve all rights and defenses under the policy regarding it.

The letter then goes on to say, “Without in

(Testimony of H. T. Duren.)

any way [124] waiving what we have already said, we wish to make the following comment," and then Cochrane goes on and comments on Mr. Duren's claim that the locker out here at Salmon Bay was exclusively the property of Hanney, Vohl and Mikelsen.

Now, of course, here is what Mr. Maloy is trying to do with this evidence. He is trying to get these letters in evidence. Why? His stated ground is in order to corroborate his own witnesses.

Now, this is a strange business where you put your own party on the stand, he testifies under oath, and then, before there is any impeachment, he is permitted to produce witnesses to corroborate what he said, to build up his character. That is the purpose of this. It has no relevance——

The Court: Well,——

Mr. Stafford: Wait until I finish, your Honor.

The Court: Very well.

Mr. Stafford: Now, having got it admitted on that ground, what does Mr. Maloy propose to use it for? Not to corroborate his witnesses at all. He proposed to argue to this jury that we in this letter denied liability on a limited ground, and are now denying liability on a different ground.

I think this is one of the most important questions of evidence that has come up in the course of this trial and I repeat my objection, that any act or transaction between Hanney, Vohl and Mikelsen, or any one or group of them, and Mr. Duren,

(Testimony of H. T. Duren.)

after the fire loss of February 24, 1942, cannot be regarded as evidence properly ad- [125] missible under any circumstances to prove what the intent of these parties was in August 1941 when this policy was written. I make that objection again without waiving the other objections.

The Court: Before you are seated, Mr. Stafford, suppose there was only one owner of this property, one insured, instead of three. Could that one insured after the loss have done these acts which are involved here in this proposed line of testimony, and after doing so, in litigation concerning the policy, could that insured have gone on the witness stand and been permitted to show what he did after the loss to present his claim to the Company under the policy?

Mr. Stafford: By all means, yes, your Honor; but——

The Court: Why can't he do it by his agent?

Mr. Stafford: He can't do it in this case either personally or by his agent. Why? Because in this case there is no issue to be submitted to the jury at all on the question of denial of liability.

The Plaintiffs have pleaded this contract as written. They have stated that they have had a loss and they have stated that we have denied liability, and we have admitted that we have denied liability.

Now, why should testimony be put in this record to show a denial of liability? There is no issue. Mr. Maloy by his own statement of record here

(Testimony of H. T. Duren.)

says the only issue for which he even contends, in addition to the amount of damages, is the question of intent when this policy was written.

So therefore the only evidence that your Honor can [126] admit properly is evidence which your Honor considers relates and has probative value on that question, on that question only; and I say this has no probative value and no relevance, no materiality and no competency, and is self-serving, to put this stuff in here after the loss for the sole purpose of twisting the matter before the jury. That is all it amounts to.

The Court: Do you wish to respond?

Mr. Maloy: Well, your Honor, I have never heard an argument in court before that you couldn't corroborate your own witnesses by relative circumstances. That is the way you corroborate your witnesses, to show that their acts are those which any probable or reasonable person would do under the same or similar circumstances.

Now, we are showing a course of conduct which they engaged in after the loss. It has been testified to already here by Mr. Mikelsen. They got no satisfaction from the insurance company, so then finally they discussed the matter with Mr. Duren.

I don't care to have the testimony of what was said, but they authorized Mr. Duren to present a claim and asked him to take it up with the insurance company, which he did.

Now, that is something that would be natural

(Testimony of H. T. Duren.)

under all the circumstances; and if this evidence isn't in the record, what is to prevent the defendant from arguing to the jury, "Now, why didn't they present a claim to the insurance company, and what kind of a claim did they present?"

There is no evidence in the record on that. Most [127] assuredly that is always material in a suit on an insurance policy.

We go further here, though. A claim was presented, broadly claiming liability on two grounds: First, that this property was in a dock or warehouse or building of the assured, under the second clause that it is material in this case, and also that the property lost or destroyed was intended for the vessel and covered by the policy.

All right. What kind of an answer do we get from the insurance company?

Now, we get an answer in which they deny liability on the ground that it wasn't in a building of the assured, because the Plaintiffs weren't the owners of the building.

Now, certainly, if they had any confidence in the position they are now taking, that under the first clause or the words "belonging and destined for the boat, Hull No. 20," is involved, that that was a valid ground for defense or denial of liability, they would have said so; and that certainly is a material circumstance to be considered in this case, and always has been in any suit that I ever heard of in a suit on a policy.

(Testimony of H. T. Duren.)

Now, when you get back to this proposition, Mr. Stafford switches from one point to the other. Now he is back on the proposition which your Honor has already overruled Counsel on, that is to say, the same question that was discussed on the summary judgment, the motion for summary judgment, and the same question that has [128] been discussed time and time again in various objections here, that there is no issue except the amount of the loss.

Now, your Honor has ruled, as I understand your Honor's ruling—and I think I am correct—that the intention of the parties is an issue in this case to be determined from all the circumstances, because the Circuit Court said that the contract was ambiguous.

Now, these are mere circumstances or facts from which inferences favorable to the Plaintiffs may rise, and we have the right to corroborate and sustain and prove our case by any fact from which any inference may be drawn which would be favorable to the Plaintiffs, and certainly this testimony will permit of the drawing of inferences, if not the establishment by direct evidence, of facts which are favorable to the Plaintiffs in this case, and tends to sustain their right of recovery here.

Mr. Stafford: Now, if your Honor please, Mr. Maloy has just come all the way and said that the answer of the fire insurance company to Mr. Duren's letter was a restricted denial of liability. I think

(Testimony of H. T. Duren.)

that I had better read that to you to impress upon you——

The Court (Interposing): It is agreeable for you to do that.

Mr. Stafford (Continuing): ——to show you just how important this question is, and I might add the further objection to Mr. Duren's testimony in this respect, that Mr. Duren has now testified that he is a Marine Insurance man of 17 years' experience, and [129] with Hansen & Rowland 13 years. I thought that Mr. Maloy was calling Mr. Duren to qualify him as an expert witness, and now here is what happens: Mr. Maloy now tries to put this letter in evidence, and, of course, you will find that he will argue to the jury—and I think it may not be necessary for him to argue to the jury—here is Mr. Duren, a man of 17 years' experience, and let me read the Franklin Fire's answer, because I submit it is entirely improper or entirely incorrect to put this in evidence as bearing on the intent of those parties when they wrote this contract, and, of course, that must be the intent that controls. You can't change the intent after it is written.

Mr. Maloy: Do you mean to say, Mr. Stafford, that subsequent acts of the parties aren't admissible to establish what the intent was when the contract was written?

Mr. Stafford: Subsequent unilateral acts are never admissible to prove the intent of both parties.

Mr. Maloy: Well, suppose the Plaintiffs had said, "We don't make any claim under the policy."

(Testimony of H. T. Duren.)

You would certainly claim that, wouldn't you, if it took place after the fire?

Mr. Stafford: That would become admissible, and you know it, under an entirely different rule, and that would be under the rule permitting the admission of admissions against interest. It would have nothing to do with this question.

Mr. Maloy: I think there can be implied admissions as well as direct. [130]

Mr. Stafford: It would have nothing to do with intent.

The Court: You may proceed with the argument.

Mr. Stafford: One party to a contract can't, by a unilateral act, impose upon a contract and the other party to it any intention by that act. He can't change or affect the intention of both parties by some act he does by himself.

But now here is the letter. This is a letter to Mr. Duren. I shan't read the address. It is from the Franklin Fire Insurance Company. Incidentally, the date of that letter is June 8, 1942, that Mr. Duren wrote, and this one is June 18.

(Whereupon, Mr. Stafford read a letter which was later marked Plaintiffs' Exhibit 5 for identification.)

Mr. Stafford: Now, this letter refers to the words "in the construction" of Hull No. 20. That is also in Mr. Duren's letter, "in the construction." The admissions of record today are that none of this was intended for use in the construction. A totally different question was presented by Mr. Duren's

(Testimony of H. T. Duren.)

letter than is presented in this case, and it was this material and equipment which was destroyed by this fire.

Now, Mr. Maloy correctly stated the law when he opened this question, when he said that the rule which prohibits an insurance company, having made a restricted [131] denial of liability, from later denying liability on a different ground, has no application here. Mr. Maloy conceded that at the outset of his remarks; and if he hadn't he must anyhow, because there is a clear and well defined reservation of all rights under the policy by the Company.

But in addition to that, in Mr. Duren's letter of June 8, which is an interesting document——

The Court: I would urge you to apply as much brevity as you consistently can with your position.

Mr. Stafford: Well, I will do it, your Honor, but it is a matter of rather considerable importance, I think.

The Court: You may also have leave to make the record that you wish to make in this connection. All I ask of you is to do so in as expeditious a way as you can.

Mr. Stafford: I shan't read, unless your Honor would prefer that I do—I might just as well read the entire letter. This is the letter written by Mr. Duren to the Franklin Fire; I won't read the address and caption. It is dated June 8, 1942.

(Whereupon, Mr. Stafford read a letter

(Testimony of H. T. Duren.)

which was later marked Plaintiff's Exhibit 5 for identification.)

Mr. Stafford: There is the letter. There couldn't be anything more vicious under the rules of evidence than the last paragraph of that letter. It is an attempt [132] to get into evidence in this case, for an avowed purpose, material which cannot possibly have any bearing on the purpose. It is trying to get into evidence here Mr. Duren's opinion of the meaning of this policy, which is solely a question of law to be determined by this court; and it is an effort to get into evidence here a statement by Mr. Duren that some other company paid a similar claim. All of that is involved in this letter and all of it is objectionable; first, because a witness, even though he were qualified as an expert—which I don't think the record yet shows—has no right to express an opinion on the one legal issue that is before the Court. He can express an opinion on some fact, but his opinion on the interpretation of this policy is not admissible for any purpose in this trial, and this letter constitutes a clear expression of Mr. Duren's opinion as to the coverage afforded by this policy.

The Court: Do you have any authority which would support your position you are now taking, that because that letter contains in it some inadmissible matter, the Court must as a matter of law rule it all out where it contains some other that the Court might think——

(Testimony of H. T. Duren.)

Mr. Safford (Interrupting): I have no authority at hand on that, your Honor. I do take that position, and I take the additional position that, even though a portion of the letter might be held by your Honor to be admissible—which I, of course, contend it can't be—your Honor cannot permit the admission of the balance of it. [133]

Now, I contend that any testimony of any conduct between these parties is inadmissible, but I clearly maintain and think the letter clearly establishes its inadmissibility right in its four corners.

The Court: The last part of that letter, Mr. Maloy, I would like to hear your comment upon that, as to whether or not that doesn't render the whole of the letter inadmissible.

Mr. Maloy: That certainly cannot render the whole of the letter inadmissible for several reasons.

In the first place, let us assume that Mr. Mikelsen or Mr. Hanney or Mr. Vohl had written this letter, and they said, "It is our opinion that we are entitled to be paid under this policy," or words to that effect here. Suppose they had said, "It is my opinion that I am entitled to recover; but before going further, would like an expression from you of your ideas."

Now, certainly anything that they could have done in bringing home knowledge to the insurance company as to the position they took on the liability under this policy would be admissible. They are stating it to the insurance company.

Now, if they may state it, certainly Mr. Duren, who is their agent, may state it; but if that were

(Testimony of H. T. Duren.)

objectionable, there is no reason why the rest of the letter is not admissible.

Furthermore, I haven't read these letters for a long time, but after hearing them re-read by Mr. Stafford, your Honor can very well see other grounds for materiality and for its relevancy. Mr. Duren writes and [134] states the facts of what occurred and calls attention to the clause of buildings, work shops and so forth of the assured, and goes on to say that it is the assured's contention—that is, Mr. Hanney and the rest of them—that it was located in a rented building and was intended for the vessel under construction and covered by the policy.

The Court: Does anyone else have copies of those letters? I would like to be looking at them, myself.

(The two letters referred to were handed to the Court.)

The Court: I will say this. I believe, Mr. Maloy I won't be able to admit the last paragraph of this letter of June 8, and I am not going to admit any of it until I find some authority that supports the Court's admitting the good part and excluding the bad. Have you got any authority on that?

Mr. Maloy: No, your Honor.

The Court: I would like to see some before I do it. For the present you can inquire of this witness what the fact was with respect to his being engaged to present this claim and what he did in respect to it, without introducing the letters.

(Testimony of H. T. Duren.)

Mr. Maloy: I would like to have them identified and make up my record, your Honor.

The Court: The Court will give you that opportunity now. You can do it now if you wish.

Mr. Maloy: I think it ought to be made in the [135] presence of the jury.

The Court: Do you?

Mr. Maloy: As long as your Honor is going to exclude these letters, I think it all ought to take place before the jury.

Mr. Stafford: I certainly object to it taking place before the jury.

Mr. Maloy: I think it is all material. I think the jury is entitled to know the attitude of Counsel for defendant in regard to certain evidence that is proffered. I think it all should take place before the jury, as long as your Honor has announced you are going to exclude it. I haven't got time to find any authority during the trial of this case on this matter. I can't possibly get any authority on it, but I know that in my reading I have run across innumerable cases where such evidence has been introduced, but I can't lay my hands on them because I thought the rule was so well settled that there wouldn't be any question about it.

Now, I want to say this, in addition to what has been said heretofore, certainly the fact that a claim is made under this policy—suppose you would exclude the letter of June 8. Certainly the letter of June 18 written by the insurance company stating

(Testimony of H. T. Duren.)

their position is admissible under any and all circumstances, because, in the first place, they do not take the position as to the denial of liability that they take now, that is, with regard to the property, the hull, tackle, apparel, and so forth, belonging and destined for the vessel. [136] They don't mention that. That is in the nature of an implied admission. It must be considered as such.

All admissions do not have to be expressed, as your Honor well knows. Its acts, conduct and omissions under certain circumstances—failure to answer or silence and many other things constitute implied admissions, or a position taken constitutes an implied admission that something else which is asserted is true.

But in addition to that, even the clause which includes the words "of the assured," what position does the insurance company take as to that? They don't say that clause is not material or doesn't cover this loss, except upon the ground, they say, that Mr. Hanney and so forth didn't own the building, wasn't the owner of it, and then it says here, "Over which the assured has complete dominion."

We have already shown by the evidence that the Plaintiffs had complete dominion and control; in fact, exclusive control of the locker in which this property was stored. It was turned over by Mr. Stakset.

The Court: You will have a chance during the noon hour, possibly a few minutes, to see if you can find some authority that will permit you, by cover-

(Testimony of H. T. Duren.)

ing up a substantial portion of a communication, to have the remainder of the communication received in evidence as an act of a party or his agent; and I won't finally rule upon that until afterwards. I would think it would be better to save the two—how many letters are there, Mr. Maloy?

Mr. Maloy: Just the two letters, your Honor.

[137]

The Court: The letter from Mr. Duren and the response to it?

Mr. Maloy: Yes, your Honor.

The Court: The reply to it, and I will give you an opportunity after lunch to make your offer of proof in the usual way.

Mr. Stafford: Now, if your Honor please, I wish for the purpose of this record to make the point that, where evidence has been offered out of the hearing of the jury, which is inadmissible, and where the Court has found it to be inadmissible, the party against whom that testimony is offered is entitled to the protection of the Court against the offer of that evidence in the presence of the jury.

I don't think that we have to or can be compelled, in the face of clearly inadmissible evidence, to be required to now go before the jury and do this all over again.

The Court: I haven't ruled finally. What I have said may have seemed that the Court was indicating a final opinion. I now intend to modify what has previously been said to this extent, that the Court will postpone ruling upon this until after

(Testimony of H. T. Duren.)

the lunch period, with the hope that somebody in the case will be able to present to the Court, for the Court's assistance, some authority on whether or not a written document that contains some admissible matter and some inadmissible matter may, by having the inadmissible matter covered up so as to keep it from the view of the jury, be used and admitted for the admissible matter. [138]

Mr. Stafford: I assume your Honor will also listen to authority on the question of whether any letter written at that time is admissible at all?

The Court: Oh, yes, I will. Yes, I will hear any authority that you have to offer; but I will say this: It is very unfortunate to delay the trial for so many of these legal matters. It is too bad you couldn't have had some authorities lined up.

Now, yesterday Mr. Stafford accommodated the Court by bringing forward out of order a matter which he thought might need to be presented out of the presence of the jury, upon the Court's inviting him to do so, and also inviting Mr. Maloy to do so.

I will ask Counsel now, do you know of any other questions—can you now anticipate any other questions which are important, like both of you consider this, that are likely to deserve discussion out of the presence of the jury, and will you suggest them now if you think of any so that we can take this occasion now to do so?

The Court, like Counsel, desires to avoid all pos-

(Testimony of H. T. Duren.)

sible occasion for excusing the jury. It is inconvenient for the jury. It is inconvenient to Counsel and the Court. Can you think of any other such questions?

Mr. Stafford: Well, as far as the Defendant is concerned, the only one I can think of, if the Court please, is the matter of putting in evidence the admissions of Plaintiffs in response to the request for admissions by Defendant. I shall, of course, at the outset of my case, wish to put those in evidence before the jury. [139]

The Court: And will there be objection to that?

Mr. Maloy: At this time I don't believe there will be. I don't consider the admissions of any force or effect or to have very much bearing on the real issue in this case.

The Court: Can you think of any other?

Mr. Stafford: That is the only one I can think of offhand, except, of course, I can't guarantee what we are going to run into.

The Court: You, Mr. Maloy, do you anticipate that there will be any other matter of analogous importance to this?

Mr. Maloy: I can't anticipate what Counsel will object to, because he objects to everything. I will say this for the information of the Court, that I shall endeavor to put some expert testimony on this afternoon or sometime, as soon as we can get to it, if we ever can, regarding value of this property, to which I presume there will be obstreperous objection. So there may be that question. I may want

(Testimony of H. T. Duren.)

to propound hypothetical questions or I may want to propound questions based upon testimony already in the record in regard to the nature of this property and its condition and the care which was given it and so forth.

Mr. Stakset's deposition goes into that very thoroughly as to the condition of the property and the care that he gave to it and so forth; and outside of that, I can't think of anything else.

The Court: Have you any objection to expert testimony of one whose qualifications are properly established [140] testifying as to the meaning of this language the appellate court thought was——

Mr. Maloy (Interrupting): Oh, no, that isn't what I am going to put expert testimony on for, your Honor.

Mr. Stafford: I most certainly do.

Mr. Maloy: I am not going to offer any testimony on that.

The Court: I misunderstood the reference, then.

Mr. Maloy: Only expert testimony, your Honor, on the value of personal property destroyed. I shall not offer any expert testimony as to the interpretation of the contract.

The Court: Very well. Mr. Stafford, did you hear the statement of Counsel as to what the expert testimony would relate to?

Mr. Stafford: Yes, regarding the value of the destroyed property.

The Court: Have you any objection? Do you

(Testimony of H. T. Duren.)

hope yourself to offer similar testimony of a similar nature?

Mr. Stafford: I haven't decided. I want to see what happens. I have prepared for such a situation, yes.

The Court: Do you admit that such testimony is competent if the qualifications of the witness are established? You have no objection to the principle of expert testimony on the value of this peculiar kind of personal property?

Mr. Stafford: Not properly offered.

The Court: Very well. Now, do you think of anything [141] else, gentlemen? I wish to recall the jury and proceed now. Was there any other subject?

Mr. Stafford: Well, what is going to be done as far as Mr. Duren is concerned upon the return of the jury, in view of your Honor's reserved ruling?

The Court: The Court will permit oral questions to be asked of this witness as to the fact or not of his being retained to present this claim and what he did about it.

I will ask Counsel for the Plaintiffs to omit reference to the letters until after lunch, at which time the Court will make a decision, after receiving such aid as you can give the Court with such authorities as you may find during the noon hour.

Mr. Stafford: Can it be agreed that the objection which I have already stated can go to the

(Testimony of H. T. Duren.)

further testimony of Mr. Duren without constantly repeating it?

The Court: If Counsel so agrees, it may.

Mr. Maloy: I don't think I can agree any more, your Honor. Counsel will have to make his objections as we go along.

The Court: Very well, then. No agreement. I didn't finish my statement. I asked Counsel for the Plaintiffs to refrain from mentioning the two letters until after lunch.

Mr. Maloy: I will.

The Court: At which time I will give Counsel an opportunity to make his record; after, as I say, I have had and considered such advice as Counsel may have touching the authorities. [142]

I think, in view of that fact, we had better arrange to meet at a time before the jury is required to be in the courtroom, so as to try to avoid that occasion of excusing the jury. I will make that convenient to Counsel.

Mr. Maloy: If I am to try to find authority, or get somebody to do it for me during the noon hour, I certainly wouldn't want the noon hour shortened any.

The Court: I will try to accommodate Counsel. I will try to accommodate Counsel. You may have to work later this afternoon.

Now, is there anything else that you wish to speak of?

Bring in the jury.

(Whereupon, the jury returned to the jury

(Testimony of H. T. Duren.)

box, and the following occurred within their presence and within their hearing:)

The Court: Let the record show all the jurors returned to their places as before. You may proceed.

Mr. Maloy: Could we have the last question, Mr. Reporter?

(Whereupon, the last question was read.)

Q. (By Mr. Maloy): You may answer that, Mr. Duren. [143]

Mr. Stafford: Just a moment. In view of the fact that it is necessary for me to make objections as we go along here, I object to that on the ground there is no ambiguity requiring parol evidence, and on the further ground that the evidence elicited by that question is incompetent, irrelevant and immaterial on the question of the intent or any other question involved in this trial.

The Court: The objection is overruled.

Q. (By Mr. Maloy): Answer the question, please, Mr. Duren. A. They did.

Q. Can you state about when it was?

Mr. Stafford: The same objection.

The Court: Overruled.

A. As I recall, sometime in April.

Q. Of that year?

Mr. Stafford: The same objection.

The Court: Overruled.

A. Well, as I recall, it was '42.

Q. By the way, in that connection, had you at

(Testimony of H. T. Duren.)

or about that time written any marine insurance for them?

Mr. Stafford: The same objection, plus the additional objection, if your Honor please, that that is clearly irrelevant and immaterial.

The Court: Repeat the question, please.

(The question was read by the reporter.)

[144]

The Court: That is sustained.

Q. (By Mr. Maloy): Did you, upon their behalf, present a claim to the Defendant, Franklin Fire Insurance Company, in connection with the fire that took place on February 24, 1942?

Mr. Stafford: The same objection, your Honor; not only the one made to the last question, but to the two preceding questions.

The Court: Overruled.

A. I did.

Q. (By Mr. Maloy): In what manner did you do it? Personally or by writing?

Mr. Stafford: The same objection.

The Court: Overruled.

A. I did it both personally and by writing.

Q. And in what manner did you do it personally?

Mr. Stafford: The same objection.

The Court: Overruled.

A. By discussion of the facts of the case with the manager of the company in his office in Seattle.

Q. And who was that?

Mr. Stafford: The same objection.

(Testimony of H. T. Duren.)

The Court: Overruled.

A. Mr. Cochran.

Q. (By Mr. Maloy): When was that? [145]

Mr. Stafford: The same objection.

The Court: Overruled.

A. That was during the month of May, I believe.

Q. Was it before you presented any claim on behalf of the Plaintiffs to the Franklin Fire Insurance Company in writing?

Mr. Stafford: The same objection.

The Court: Overruled.

A. It was before.

Q. Did Mr. Cochran, representing the fire insurance company, admit or deny liability upon that occasion?

Mr. Stafford: Now, if your Honor please, I object to that for the reasons already given, plus the additional reason that it is calling for the conclusion and opinion of the witness, since no proper foundation has been laid.

The Court: I think it calls for a conclusion. On that ground it should be sustained.

Q. (By Mr. Maloy): What did he say in regard to the claim that was presented by you personally, Mr. Duren?

Mr. Stafford: I wish to object to that for the reasons given to the other questions, with respect to the lack of an issue calling for parol evidence, and for the lack of relevancy, materiality or competency.

(Testimony of H. T. Duren.)

The Court: The objection is overruled. You may state.

A. Well, as I recall, Mr. Cochran didn't commit himself one [146] way or the other.

Mr. Stafford: Now, just a moment. If your Honor please, I move that that answer be stricken because it is not responsive.

The Court: It is stricken.

Mr. Stafford: He was asked what Mr. Cochran said.

Q. (By Mr. Maloy): Well, did he deny liability at that time?

Mr. Stafford: I object to that as calling for an opinion of the witness and a conclusion.

The Court: The objection is sustained. You can say what he said.

Q. What did he say, then?

The Court: If you recall.

Mr. Stafford: The same objection.

The Court: The objection is overruled. He may state what he said if he recalls what he said.

Mr. Stafford: Including an objection on the grounds of violation of the parol evidence rule.

The Court: That is overruled.

A. Well, as I recall, Mr. Cochran told me that he didn't consider the claim admissible under the policy, but that he would give the matter consideration and that I was to write him.

Q. Then, pursuant to that conversation, did you later on write him?

(Testimony of H. T. Duren.)

Mr. Stafford: The same objection, if your Honor [147] please.

The Court: The objection is overruled.

A. I did.

Mr. Maloy: I think, your Honor, that I would like to have these letters identified, because I think Mr. Duren wants to get back to Tacoma; and if we can have these identified——

The Court: I will have to ask him to return after lunch.

Mr. Maloy: Will you?

The Court: Yes, and the witness is directed to be here at two o'clock.

Mr. Maloy: I am only trying to accommodate Mr. Duren. I think that is all, Mr. Duren, at this time.

The Court: You may cross-examine.

Mr. Stafford: Well, I think, in view of the fact that Mr. Duren is to return at two o'clock,——

The Court: (Interrupting) You should cross-examine now, if you wish at all, concerning the matters inquired into up to this time.

Mr. Stafford: Well, I still must maintain that I have a right to reserve my cross examination until the witness—I have no questions at this time.

The Court: The Court does not deny you the right to cross-examine as to anything that may be developed when the witness returns after lunch. The Court directs, if you wish to cross-examine as to anything that has occurred up to this time, that you now proceed to do so. [148]

(Testimony of H. T. Duren.)

Mr. Stafford: No, but, if your Honor please, so that the record may show it, whether or not it will be desirable for me to cross-examine as to what has already occurred may very well depend upon what occurs after lunch. Therefore, I ask that I be permitted to reserve my right to cross-examine this witness until after the witness has finished.

The Court: That request is denied, upon this condition, that after lunch, if it occurs that there is something that develops then for the first time that makes it desirable for you to cross-examine, when you didn't need to now, the Court will consider that.

Mr. Stafford: That is entirely agreeable. I have nothing at this time. If there is something occurs later, I want the right to go over this. I have no questions at this time.

The Court: Very well, you may step down, and be here at two o'clock, will you? Remain in attendance until further excused by the Court.

(Witness excused.)

Mr. Maloy: I would now like to read the deposition of Henry Stakset.

The Court: You may proceed.

Mr. Maloy: I wish the record to show, your Honor, that this deposition of Henry Stakset was taken at the instance of the Defendant, as a witness on behalf of the Defendant, which the Plaintiff is now reading.

Mr. Stafford: Now, if your Honor please, I move [149] that that remark of Counsel be stricken.

The Court: The motion is denied.

Mr. Stafford: That is an entirely improper remark, if your Honor please.

The Court: I believe the Court has already ruled, Mr. Stafford. Isn't the record complete enough?

Mr. Stafford: I don't think it is.

The Court: I will hear you, then, some other time in the absence of the jury, if you will remind me of it, and I will be glad to consider any authorities that you may then wish to bring to the Court's attention.

Mr. Stafford: Shall we start?

The Court: You may proceed.

Mr. Stafford: Shall we start from the beginning?

Mr. Maloy: I think so. We only got three or four questions read yesterday.

The Court: Page 3, was that the one?

Mr. Maloy: Yes, page 3, your Honor.

The Court: You may proceed to ask the questions, will you, please, Mr. Stafford.

(Mr. Stafford read the questions and Mr. Maloy the answers from the deposition of Henry Stakset, as follows:)

HENRY STAKSET,

testified by deposition as follows:

"Q. Your name is Henry Stakset, is it?

"A. That's right. [150]

"Q. What is your business?

"A. Fishing.

"Q. Fishing business? A. Yes.

"Q. Where do you live?

"A. I live in Tacoma.

"Q. Tacoma, Washington? A. Yes.

"Q. Are you about to go to sea?

"A. Yes, I figure to go out tomorrow.

"Q. How long have you been in the fishing business?

"A. Oh, since I was sixteen.

"Q. Have you lived up around the Puget Sound most of your life?

"A. No. I lived there about, pretty near twenty-three years now.

"Q. Do you remember selling some equipment belonging to a fishing boat to Oluf Hanney and Hans Mikelsen? A. Yes.

"Q. When did you sell it to these men?

"A. That was in 1941, the fall.

"Q. The fall of 1941? A. Yes.

"Q. At the time of the sale you made a list of the equipment that was being sold? A. Yes.

"Q. Mr. Whelan has handed me a typewritten list, here, of equipment which apparently bears your signature on each page. I show it to you. Do you recognize your signature on those pages? [151]

"A. Yes, that is my signature, all right.

(Deposition of Henry Stakset.)

“Q. On the second page, too? A. Yes.

“Q. Is that the equipment that you sold these two men?

“A. Yes. Do you want me to read it over?

“Q. Yes. A. That is the list, yes.

“Q. How much did you sell that equipment for to these two men, Hans Mikelsen and Oluf Hanney? A. \$4000.

“Q. Where was it at the time it was sold?

“A. It was in a locker in the Fishermen's Dock, there, in Seattle.

“Q. Is that the Salmon Bay Terminal?

“A. Yes.

“Q. You had stored it there, had you?

“A. Yes.

“Q. How long had it been in storage?

“A. Oh, when they bought it it was about six or seven months.

“Q. That would be, then, in the spring of 1941 that you put it in storage? A. Yes.

“Q. Why did you put it in storage?

“A. Well, we didn't use it then, and it had to be taken care of, salt it down and hang up the lines so it will keep.

“Q. Had you had it on a boat? A. Yes.

[152]

“Q. You had a boat, and you took it off the boat? A. Yes.

“Q. What was the name of your boat?

“A. Midnight Sun.

“Q. Did you own that boat?

(Deposition of Henry Stakset.)

“A. I owned part of it, yes.

“Q. How old was the boat; when was the boat built? A. In 1937.

“Q. 1937? A. Yes.

“Q. Had you been fishing with that boat from 1937 until the time you took it off and stored it?

“A. Yes; every winter down here, every season down here.

“Q. That is, down outside of San Francisco Bay? A. Yes.

“Q. What is the fishing season outside of San Francisco Bay?

“A. Well, start here in August or September, and last for up to February of next year.

“Q. What kind of fishing was that?

“A. Sardine fishing.

“Q. Did you fish during that season which began in September, 1937?

“A. Not at the beginning. The boat was not quite ready and we start in the later part of September or the first of October.

“Q. Of 1937? A. Yes.

“Q. At the end of the season, in February, 1938, you [153] went back to Tacoma?

“A. Yes.

“Q. Then did you fish in the season which began in September of 1938? A. Yes.

“Q. Then returned to Tacoma in February of 1939? A. Yes.

“Q. Did you fish in the season beginning September, 1939?

(Deposition of Henry Stakset.)

“A. Yes, not at the beginning, probably the later part of September.

“Q. The latter part of September.

“A. Yes.

“Q. And then went back in February of 1940?

“A. Yes.

“Q. 1940? A. 1940, yes.

“Q. Did you go back to Tacoma in, say, February, 1941? A. Yes.

“Q. That is when you put this gear that was sold in storage? A. Yes.

“Q. Did you fish in 1941? A. No.

“Q. From this boat? A. No.

“Q. What happened to your boat?

“A. The Government took it; sold it to the Government.

“Q. The Government requisitioned your boat, did it? [154]

“A. Well, it took it.

“Q. What did you do with your boat between these fishing seasons that you described?

“A. Chartered it out in the summer time.

“Q. Chartered it out? “A. Yes.

“Q. Did you charter it out each summer?

“A. I don't remember. I chartered them out two summers.

“Q. Two summers?

“A. Yes; I remember two summers.

“Q. Do you remember where your boat was built?

(Deposition of Henry Stakset.)

"A. At Tacoma Boatbuilding Company, Tacoma.

"Q. The boat was delivered to you about August of 1937, was it?

"A. Yes, the later part of August.

"Q. Did you outfit the boat for fishing that season yourself? "A. Yes.

"Q. When you first outfitted the boat, did you have equipment on the boat substantially what is shown here on this list?

"A. Well, just about the same, yes.

"Q. Just about the same?

"A. Just about the same, yes, a little more later on, I guess.

"Q. A little more later on? "A. Yes.

"Q. I will draw your attention to this entry of 175 Montara bags and rubber; did you have those on board [155] the first season, 1937?

"A. No, not the full amount there.

"Q. When did you get the rest of the bags?

"A. I don't know; in 1938 and 1939.

"Q. 1938 and '39? "A. Yes.

"Q. What are those bags made of?

"A. Well, the inside is rubber and outside is covered with canvas.

"Q. What are they used for? "A. Floats.

"Q. Used for floats? "A. Yes.

"Q. Do they help with the corks?

"A. Yes.

"Q. To keep the seine afloat?

"A. Yes.

(Deposition of Henry Stakset.)

“Q. From year to year you replenished those items, that equipment, from time to time?

“A. Yes.

“Q. What I am getting at is, the first year you had substantially the same equipment on board as is shown by that list, with the exception of the Montara bags? “A. Yes.

“Q. The Montara bags, you got some more, some additional ones, more than you had the first year, and you got those in 1938 and 1939?

“A. Yes.

“Q. Were there any other things that you added sub- [156] sequent to 1937 besides the Montara bags; I mean additional equipment that was just not replacements?

“A. Well, replaced it. I put a little more—got the seine a little deeper, a little bit longer.

“Q. How much additional seine do you think you put on?

“A. About, probably 20 percent.

“Q. Probably 20 percent. Each year you went out fishing and before you went out and during the season you would buy replacements as they were necessary, would you? “A. Yes.

“Q. Where did you make those purchases in 1937?

“A. I bought most of the seine and corks and leads from Lindgren.

“Q. Was that up in Seattle?

“A. In Seattle, yes.

(Deposition of Henry Stakset.)

"Q. Was the seine of American manufacture that you bought from Lindgren?

"A. No, it was Japanese web.

"Q. Japanese web? "A. Yes.

"Q. Is that as good as American web?

"A. No, it is not as good as American web.

"Q. Where did you buy the other stuff that you outfitted your boat with?

"A. Later on I bought from Pacific Marine, Nordby Supply Company, and Seattle Ship Supply Company, in Seattle.

"Q. All those concerns are in Seattle?

"A. Yes. [157]

"Q. Did you buy from these concerns the first year, in 1937?

"A. I might have bought a little.

"Q. Most of the stuff you bought the first year from Lindgren? "A. Yes.

"Q. The following years, as you needed replacements you bought from these other concerns up there? "A. Yes.

"Q. When you are down in San Francisco during the fishing season, when you were down here, did you buy anything in San Francisco?

"A. Yes, I bought from Cincotta Bros.

"Q. The stuff you bought from Cincotta Bros. was replacement, and so on? "A. Yes.

"Q. How much did the original outfit cost; I don't mean the boat, I mean the original outfit of seines, and corks, and leads, and gear that is comparable to this that is on the list, here.

(Deposition of Henry Stakset.)

“A. Well, I cannot say exactly, but the first year it cost around eight thousand, I guess.

“Q. About eight thousand?

“A. Yes.

“Q. How much did your boat cost, do you remember? Or, how much did your total investment amount to? “A. About \$43,000.

“Q. \$43,000? “A. Yes.

“Q. How much did your boat cost? [158]

“A. I believe it was around \$36,000.

“Q. \$36,000? “A. Or \$35,000.

“Q. \$35,000 or \$36,000? “A. Yes.

“Q. So your seines and nets and your corks and the rest of the equipment cost in the neighborhood of seven or eight thousand dollars?

“A. Yes.

“Q. You used this boat and its equipment every season from 1937 to 1940, inclusive?

“A. Yes, that's right.

“Q. Did you make any large purchases of equipment after the original season of 1937?

“A. Well, the Japanese web wasn't very good. In 1938 and 1939 I bought quite a bit replacements.

“Q. Of netting? “A. Netting, yes.

“Q. You would not buy it all in one year, though? “A. No.

“Q. You bought some in 1937 and some in 1938?

“A. 1938 and 1939.”

Mr. Stafford: The next one doesn't make sense. It says “1939 and 1939.” I guess it meant 1938 and 1939.

(Deposition of Henry Stakset.)

“Q. And the last purchases you made in the way of replacements were during the season of the fall of 1940? “A. Yes.

“Q. When you store this equipment what means are [159] used to preserve it during storage?

“A. Well, the netting is salted down, use about eight or nine tons of salt on the webbing; the lines and corks we hang up to dry.

“Q. Do you salt it down with a salt brine?

“A. No.

“Q. I mean the webbing.

“A. No. Haul it through a salt brine.

“Q. Salt brine?

“A. Cover it with salt, you can't see the webbing.

“Q. How long do you think the netting will keep salted down that way?

“A. Well, I haven't tried, but in one year I don't think it would do any damage for one year.

“Q. That depends on whether or not it is covered with salt and brine? “A. Yes.

“Q. If you have dry spots on it, what happens then?

“A. Well, probably it gets hard, you see, and break out there where there is no salt.

“Q. How long was the life of the nets that you were using from 1937 to 1940?

“A. Well, all the time, if you take care of it, say about four or five years?

“Q. Then it is gone? “A. Yes.

“Q. And you have to replace? “A. Yes.

(Deposition of Henry Stakset.)

“Q. I notice on this list some mattresses, were those part of the original purchase? [160]

“A. Yes.

“Q. That is the original year of 1937, mattresses? “A. Yes.

“Q. Can you identify anything on that list that I have handed you and which you have identified, yourself, can you pick out any of the things there that were new as late as 1940?

“A. There is one item here, 350 fathoms.

“Q. Of what?

“A. 5/8 galvanized purse wire.

“Q. That was bought in 1940? “A. Yes.

“Q. Can you pick out anything else that was bought as late as 1940?

“A. There is a strip of netting here, I don't know if it was bought in 1940, but it wasn't used.

“Q. What is that?

“A. That is 160 fathoms of $1\frac{3}{8}$, 9-thread, 400 mesh.

“Q. That is netting? “A. Yes.

“Q. That had never been used? “A. No.

“Q. Is that the item where on that line the pencil notation, “New” is after it?

“A. Yes, I think so.

“Q. Is that your handwriting, do you know?

“A. I can't tell.

“Q. Do you recognize any other item on that list that was new in 1940?

“A. Well, I can't remember; there are so many things [161] here that I can't remember.

(Deposition of Henry Stakset.)

“Q. You don’t recognize anything more on there that was new as late as 1940?

“A. No, not on that list, there.”

Mr. Stafford: The list was then offered in evidence, and it would probably be proper to advise the jury that this is the list that is already introduced.

Mr. Maloy: Yes, that is Plaintiffs’ Exhibit No. 2, the inventory, that was offered as part of this deposition also.

Mr. Stafford: That is the same list that they were talking about here.

Mr. Maloy: Yes.

Mr. Stafford: Shall I proceed?

Mr. Maloy: Yes, please.

“Q. How big was the Midnight Sun?

“A. Over all, she was 78 feet long.

“Q. Is that what you call one of the big boats in the fishing business?

“A. Yes. Not the biggest, but one of the big ones.

“Q. What percentage do you think of the big boats, that is, the size of the Midnight Sun, did the Government take when they requisitioned your boat, or about that time?

“A. Well, I can’t tell that.

“Q. Do you think they took one-half of them?

“A. No, not her equipment.

“Q. Those that were in operation had already their equipment, didn’t they? [162]

“A. Those that were in operation had, yes.

(Deposition of Henry Stakset.)

“Q. And the gear that you sold, covered by this Stakset Exhibit 1, you didn’t have any sale for it, except to somebody who had a new boat?

“A. Well, I think we could sell it to the other boats, too; it was hard to get webbing at that time, and they were around asking for webs; it was hard to get webbing at that time.

“Q. Could you sell all of it to one buyer or would you have to sell it piecemeal?

“A. Well, they asked for pieces but we want to sell nothing except the whole thing.

“Q. They were mainly interested in the netting? “A. Yes.

“Q. In your opinion, what was the second-hand value of this equipment that you sold and that is represented by Stakset Exhibit 1, at the time of the sale?

“A. Second-hand, it was worth about seven or eight thousand dollars second-hand.

“Q. You sold it for \$4,000. “A. Yes.

Cross Examination

“Q. Mr. Stakset, how old are you?

“A. 37.

“Q. Did I understand you to say you have been a fisherman since the time you were 16?

“A. Yes.

“Q. Have you ever owned any other fishing vessels [163] besides the Midnight Sun?

“A. Not in this country.

“Q. Where did you own them?

“A. In Norway.

(Deposition of Henry Stakset.)

"Q. How many vessels did you own?

"A. I had a part in two.

"Q. Were they vessels the same size as the Midnight Sun? "A. A little smaller.

"Q. Were you the master and skipper of those?

"A. No, I was not skipper there.

"Q. How long did you own these other vessels?

"A. The first one I had for two years.

"Q. In what year was that?

"A. That was in 1917 and 1918.

"Q. 1917 and '18?

"A. Yes. The other one I had in 1919 to 1923, when I left.

"Q. You were familiar with the fishing gear and other equipment on these vessels? "A. Yes.

"Q. You saw the fishing gear and equipment on these vessels? "A. Yes.

"Q. What year was the fishing vessel Midnight Sun built? "A. In 1937.

"Q. You bought it the same year?

"A. Yes. It was ready the later part of August or September.

"Q. Did I understand you to say it was built at [164] Tacoma Shipping Company?

"A. Tacoma Boatbuilding Company.

"Q. Did you have other partners?

"A. Yes; we were nine other partners.

"Q. What part of the year 1941 did the United States take the fishing vessel, the Midnight Sun?

"A. That was in the spring.

(Deposition of Henry Stakset.)

“Q. At the time the United States took your fishing vessel, how much did it pay you and your partners?”

Mr. Maloy: There is an objection.

“A. \$42,400, I think.

“Q. That amount did not cover the gear or other fishing equipment on the vessel, did it?

“A. No.

“Q. Mr. Stakset, do you recall what part of the year 1941 you sold the gear of the vessel Midnight Sun?

“A. It was in August or September.

“Q. You sold it to Mr. Mikelsen and to Mr. Hanney? “A. Yes.

“Q. How much did you receive for the fishing gear at that time? “A. \$4,000.

“Q. This gear had been stowed in locker 325 at the Salmon Bay Terminal at the port of Seattle?

“A. Yes, that was the number.

“Q. At the time of the sale you had a key to this locker?”

Mr. Stafford: Now, if your Honor please, I would like to switch roles at this point and suggest that there [165] is no point in putting in evidence any testimony regarding the ownership of Locker 325 at Salmon Bay Terminal, because that is all admitted. There is no issue regarding it and it is just a waste of time to put it in. The Defendant admits the stuff was in 325 and that the Plaintiffs had control of that locker.

(Deposition of Henry Stakset.)

The Court: Is there any purpose other than that?

Mr. Maloy: Well, I think not, but I think the testimony ought to go in. While it may be admitted by the Defendant that we had exclusive control of that locker, it seems to me that it would be material.

The Court: On what issue is it?

Mr. Stafford: It is a complete waste of time. The issue is admitted. The jury can't be interested in it.

The Court: If it were something other than a deposition——

Mr. Maloy: Well, I don't care. If it is admitted that they had exclusive control of the locker and had the key to it, I don't care whether you answer those two or three questions there or not.

Mr. Stafford: I am making no admissions other than those already in the pleadings. I am making that objection, that there is no issue on this question to go to the jury at all, and we are just sitting here wasting time.

Mr. Maloy: Well, you have wasted more time in making the objection than it would take to read the two questions and the two answers, so that can't be the reason for it.

The Court: Both Counsel will kindly just state the [166] objection. Do you insist upon proceeding with the reading of it, Mr. Maloy?

Mr. Maloy: Yes, your Honor, I think it should be read.

(Deposition of Henry Stakset.)

The Court: You may proceed.

“A. The watchman on the dock had a key in his office there.

“Q. Did you have that key transferred over to Mr. Mikelsen?

“A. Yes. I told him to get the key from the watchman when he needed it.

“Q. You were very anxious to dispose of this fishing gear, weren't you?”

Mr. Stafford: Now, objection was made at that time by Mr. Mackey representing the Defendant, that the question called for testimony that was incompetent, irrelevant and immaterial.

The Court: What boat or gear does that concern?

Mr. Maloy: The gear involved here, your Honor.

The Court: The objection is overruled.

“A. Well, I couldn't get another boat. I figured it might get lost, it wouldn't do it any good laying out that way for any length of time, and I would like to sell it, yes.

“Q. You knew at that time, prior to the sale of this fishing boat, that you would be unable to get another fishing boat, didn't you?

“A. Yes. [167]

“Q. You also knew you would be unable at the particular time, due to shortage of material, to build another fishing boat? “A. Yes.

“Q. How many discussions did you have with Mr. Mikelsen and Mr. Hanney prior to the sale of this fishing gear?

(Deposition of Henry Stakset.)

"A. I can't remember that.

"Q. Was there one, or several conversations?

"A. Several, I guess.

"Q. At these discussions you knew that they wanted this particular gear that they were buying from you, that is, the gear on the list that we have already identified, and which has been admitted as Stakset Exhibit No. 1, for another fishing vessel which Mikelsen and Haney were building in Tacoma, didn't you? "A. Yes.

"Q. The amount of \$4,000 which you received from Mr. Mikelsen and his partner did not represent the true value of this fishing gear at the time you sold it in August, 1941?"

Mr. Stafford: Mr. Mackey made an objection to that question, your Honor, and I think that I should have it appear that the objection is restated at this time. He objected to that on the ground that the fact that they sold it for \$4,000 is the best evidence of its value at this time, and I would like the Court to rule on that at this time.

The Court: The objection is overruled.

"A. No. It was worth more than we got for it.

[168]

"Q. Well, it was due to the fact you couldn't—

"A. I couldn't get a boat, so it was better to get some money for it or it probably would spoil.

"Q. Now, referring to this cotton netting or webbing that is set forth on this list that you have already examined, Mr. Stakset, you say that this

(Deposition of Henry Stakset.)

netting was bought at the time that you got the vessel in 1937; is that correct?

"A. No; very little of that netting on the list was bought in 1937.

"Q. Was the original netting Japanese netting?

"A. Yes, the first one was.

"Q. Whom did you buy it from?

"A. John Lindgren.

"Q. How long did this netting last?

"A. The first one?

"Q. Yes, the first one.

"A. We didn't use much of it the second year. We used probably only half of it the second year.

"Q. But you had to start making replacements of that netting, didn't you? "A. Yes.

"Q. You made those replacements in 1938 and 1939? "A. Yes.

"Q. What was the price of the netting at that time, during 1938 and 1939 when you were buying this netting?

"A. It was around 80 cents a pound.

"Q. From whom did you buy the new netting?

"A. I bought most of it from Pacific Marine and then I bought some from Nordby and some from Seattle [169] Ship Supply.

"Q. Did you buy any of it from Cincotta Bros.?

"A. Yes, down here.

"Q. This new webbing was replaced and repaired from time to time during 1938, 1939 and 1940, wasn't it? "A. Yes.

(Deposition of Henry Stakset.)

"Q. Did you use tar or other materials to keep this webbing in first class condition?

"A. Yes, used tar, coal tar.

"Q. How often was it tarred to keep it in good condition?

"A. Put it on once when it was new.

"Q. Did you put it on at regular periods of time when you finished fishing?

"Mr. Mackey: I object to that on the ground he put it on once when it was new. He has already testified that is when he put it on.

"Mr. Whelan: I want to know if he put it on afterward, though.

"Mr. Mackey: He said he put it on once when it was new.

"The Witness: When it was new, yes, that's right.

"Q. After a year's period elapsed did you put any tar or any other material on this webbing to keep it in first class condition?

"A. Tried once what they call net dip; that's about the same as coal tar.

"Q. Did you put any tar on it during the year 1940 after your fishing season?

"A. That I can't remember. [170]

"Q. Did you put it on prior to your fishing season?

"A. I put once on; I think it was 1939 I put some on.

"Q. But at all times from the time of the pur-

(Deposition of Henry Stakset.)

chase in 1938 and 1939 you kept this webbing in first-class condition of repair or replacement?

"A. Yes.

"Q. How much time did you put in repairing this webbing?

"A. The whole crew was working on the gear; I can't say the hours.

"Q. Did you put in several hours a day?

"A. To hang the seine up took about ten or twelve days, twelve men.

"Q. How many barrels of tar did you use each year on this webbing?"

Mr. Maloy: I think that question was withdrawn, and the question should be the top of page 20.

"Q. How many barrels of tar did you use the first time?

"A. About ten or twelve barrels of tar for the full seine.

"Q. Do you know, Mr. Stakset, what the price of webbing was in the year 1940?"

Mr. Maloy: Then that wasn't answered.

"Q. On this list, Mr. Stakset, there is mention of a lifeboat; was this part of the original gear of the *Midnight Sun*? "A. Yes.

"Q. And between the years 1937 and 1939 did this [171] lifeboat become battered?

"A. Yes, it got smashed up.

"Q. Did you fix this lifeboat by putting in new planks and new sides? "A. Yes.

"Q. Did you paint it at that time?

(Deposition of Henry Stakset.)

"A. Well, we put linseed oil on it.

"Q. Was the lifeboat kept in good condition?

"A. Yes, it was just as good as new.

"Q. Did you put linseed oil on it each year after that?

"A. Yes, every year.

"Q. So in 1941, August, at the time you sold the fishing gear and other equipment to Mikel-sen, this lifeboat was in first-class condition, wasn't it?

"A. Yes.

"Q. Mr. Stakset, I believe you have testified that several items on this list, including 350 fathoms of 5/8 galvanized purse wire was brand new; is that correct?

"A. That is correct.

"Q. Is it also correct that that wire had never been used?

"A. That is correct.

"Q. And you have also testified that 160 fathoms of 1-3/8 9-thread netting was also brand new, is that correct?

"A. That is correct.

"Mr. Mackey: For identification, may we have it indicated that that is the fourth item from the end of that list, Stakset Exhibit 1." [172]

Mr. Stafford: Now, of course, in this case it is Plaintiff's Exhibit No. 2.

"—fourth from the end on the last page, the one that has 'new' marked after it?

"Mr. Whelan: Yes, that's right.

"Q. There is also listed on these two sheets which have been identified and marked as Stakset Exhibit No. 1 manila rope; isn't it correct that this

(Deposition of Henry Stakset.)

manila rope was brand new and only had been in the water a few times?

“Mr. Mackey: Just a minute. What item are you referring to?

“Mr. Whelan: I am referring to a great deal of rope on these sheets, there are quite a few.

“Mr. Mackey: All of it?

“Mr. Whelan: Yes.

“Mr. Mackey: All of the manila rope?

“The Witness: Well, most of it was new, yes, but not all of it.

“Mr. Whelan: Not all of it?

“A. No.

“Q. Manila rope was very hard to obtain in 1941, wasn't it?

“A. Yes, it was hard to get.

“Q. There is also listed here one large purse drum and one small purse drum. When were these bought?

“A. When I bought them new.

“Q. When you bought them new. Were they replaced at any time? A. No.

“Q. Were they kept in first-class condition?

[173]

“A. Yes. They are wire, they last for years.

“Q. Did you paint them?

“A. Yes, paint them every year.

“Q. Every year. There is also listed on this list anchor shackles. These were bought at the same time the vessel was built?

“A. I can't say that, I don't remember that.

(Deposition of Henry Stakset.)

“Q. Do you know when they were bought?

“A. No, I don’t remember that.

“Q. *Do you know when they were bought?*

“A. *No, I don’t remember that.*

“Q. At the head of this list is mentioned some 6500 6-inch Sel. Corks. Where were these bought?

“A. Bought most of them the first year from Lindgren.

“Q. Did you replace them? A. Yes.

“Q. How many were replaced?

“A. That I can’t tell. When they broke we replaced them.

“Q. You kept these corks in first class condition?

“A. Yes; we dried them every year.

“Mr. Mackey: Q. Dried them every year?

“A. Yes.

“Mr. Whelan: Q. Cork was obtainable in 1941, wasn’t it?”

Mr. Maloy: That question wasn’t answered.

Mr. Stafford: That was withdrawn.

“Q. In 1937, when you purchased these corks, did you have any trouble buying them? [174]

“A. 1937?

“Q. 1937 A. They were hard to get.

“Q. It was hard to get in 1937? A. Yes.

“Q. The same condition existed in 1938 and 1939? A. Yes.

“Q. The same condition in 1940 and 1941?

“A. Yes.

(Deposition of Henry Stakset.)

“Q. These corks were in first-class condition, though, at the time of the sale to Mikelsen in August, 1941?

“A. Yes, they were as good as you could get them. They had been used.

“Q. There is mention on this list, Mr. Stakset, of wood blocks. Were they part of the original equipment of the vessel?

“A. Most of them; broke probably a couple of them.

“Q. And replaced them from time to time, is that correct? A. Yes.

“Q. Do you know the last time you replaced them?

“A. No. One broke down there, I can't remember the year.

“Q. Do you know if it was 1939 or 1940?

“A. It was 1938.

“Q. When you sold the fishing gear and equipment to Mikelsen and his partner, you and your partners received \$4,000? A. Yes. [175]

“Q. That is correct, isn't it?

“A. That is correct.

“Q. You are still familiar with the value of fishing equipment, aren't you? A. Yes.

“Q. Where are you working now, Mr. Stakset?

“A. My own boat, the North Sea.

“Q. You are the master of that vessel?

“A. Yes.

“Q. How large a vessel is that?

“A. 63½ feet.

(Deposition of Henry Stakset.)

“Q. Since August, 1941, have you been working on fishing vessels? A. Yes.

“Q. You have handled the fishing gear and other equipment on these various fishing boats?

“A. Yes.

“Q. Have you done any repairs on these fishing gear and equipment on these other vessels?

“A. Yes.

“Q. Have you replaced any equipment and fishing gear on these vessels?

“A. On my own boat I replaced the gear.

“Q. Do you know in October, 1944, the value of fishing gear and equipment? A. Yes.

“Q. You knew in August, 1941, the value of your fishing gear, didn't you? A. Yes.

“Q. What was the value of your fishing gear in [176] February, 1942, if you know?”

Mr. Stafford: Well, just a minute. I object to the admission of the answer to that question, your Honor, for a number of reasons. The first is that this man has testified that he sold this equipment for \$4,000 in August or September, 1941. There is not one word of evidence even suggested that he saw the equipment after August or September of 1941. How can he be permitted to testify as to its value in February 1942?

In other words, there has been no proper foundation laid for any testimony that would permit him to express an opinion as to its value in February 1942.

(Deposition of Henry Stakset.)

For those reasons we object to the admission of the answer to that question.

The Court: Will you read beginning with line 19 on page 25, both of you. It seems to be postponed. There is nothing done until you get down to that point.

Mr. Maloy: Do you want me to read that on page 25, all of it?

The Court: No. I would suggest that you read it, line 21.

Mr. Stafford: I still reassert my objection. There is not a bit of evidence here that——

Mr. Maloy (Interrupting): “You knew the value of your fishing gear in February, 1942, isn’t that correct?” He says, “Yes.”

Mr. Stafford: Well, of course, we can all stop if you are going to read questions and answers while the objection is being considered.

The Court: There is nothing answered. He doesn’t [177] state the value yet.

Mr. Stafford: I know that, your Honor, but I am objecting to him testifying as to the value, when there is no proper foundation laid here.

Mr. Maloy: He said he knew the value.

The Court: I asked that you both read that line 21, and now I assume that both of you have read it, and the Court has read it and has considered it, and the objection to the inquiry is overruled in view of the witness’ last answer on line 22, page 25.

Mr. Stafford: Which is merely his own statement that he knew the value in February?

(Deposition of Henry Stakset.)

The Court: Yes. I have in mind, Mr. Stafford, the witness's previous testimony about his connection with fishing and with the conditions and supply of fishing netting at about this time.

Mr. Stafford: I do not think I make myself clear to the Court. Here is a man—suppose I sold my automobile in September of 1941, and I knew all about that automobile, and I didn't see it until February of 1942. How can I testify as to what it is worth in February 1942?

The Court: I think from what appears in this deposition that this witness has shown familiarity with the conditions of this particular property and its surroundings.

Mr. Stafford: Your Honor, up to this point there is not a bit of evidence that he saw that property between September 1941 and February 1942.

The Court: The objection is overruled. [178]

Mr. Stafford: Exception.

The Court: Allowed.

“Q. What was the value of your fishing gear in February, 1942?

“A. About nine or ten thousand dollars.

“Q. Mr. Stakset, you testified that you used your boat from 1937 to 1940, inclusive.

“A. Correct.

“Q. During the years 1938 and 1939 you made large purchases of webbing; isn't that correct?

“A. Yes, that is correct.

“Q. Did you make large purchases of webbing in the years 1938 and 1939?

(Deposition of Henry Stakset.)

“A. Yes, quite a bit in 1938 and 1939.

“Q. 1940 was the last replacement that you made; is that correct? A. That is correct.

“Q. You have also testified that your original outfit cost about \$8000; is that correct?

“Mr. Mackey: He said seven to eight thousand.

“Mr. Whelan: Q. Seven to eight thousand dollars? A. The fishing gear, yes.

“Q. Had the price of fishing gear gone up from the time you first made your purchase of this gear in 1937 to 1941?”

Mr. Stafford: We will object to that, your Honor. There is no proper foundation.

The Court: Well, he doesn't answer it, does he?

Mr. Maloy: I don't believe he does. The objection [179] is made and he doesn't answer it. The next question is:

“Q. What is the life of this netting or webbing?

“A. Well, that all depends on how it is taken care of.

“Q. If it is taken very good care of?

“A. It will last four or five years.

“Q. You tarred this webbing several times during the last——

“Mr. Mackey: Just a moment. Not several times. I object to your putting words into the testimony. He said he tarred it once when he first started, and dipped it once more.

“A. That's right.

“Q. You salted the webbing down, is that correct? A. Correct.

“Q. What year was that done?

(Deposition of Henry Stakset.)

"A. We salted every year. The last time I came in we salted it again.

"Q. Where was that, in Tacoma?

"A. In Seattle.

"Q. That was in the spring, February of 1941; is that correct? A. That is correct.

"Q. Did I understand you to say, Mr. Stakset, that you chartered your boat out during the summer? A. In the summer time.

"Q. How long did that charter generally run?

"A. Oh, from four to five months.

"Q. Did you go over and repair your equipment after the vessel had been chartered out? [180]

"A. I repaired the vessel, yes.

"Q. What replacements did you buy from Cincotta Brothers here in San Francisco?

"A. I bought webbing and rope.

"Q. You bought webbing and rope?

"A. Yes.

"Q. Anything else?

"A. I can't remember exactly.

"Q. Did you buy your wood blocks from him?

"A. One or two.

"Q. Did you buy any of the rubber buoys?

"A. Might have bought big round ones, I think we got them from Cincotta.

"Q. Do you know when these were bought?

"A. No, I don't remember; 1938, I think.

"Q. You have testified as to bags of rubber, I believe it is these Montara bags, 175, which were bought sometime in 1938 or 1939.

(Deposition of Henry Stakset.)

“Mr. Mackey: No; part in 1937 and the rest in 1938, he said.

“Mr. Whelan: 1938.

“Q. Did you ever replace any of these bags?

“A. A few of them got busted.

“Q. Do you know what it cost you to replace them?

“A. No; \$5 apiece, I think. I believe so, I am not sure.

“Mr. Whelan: I have no more questions.

Redirect Examination

“Mr. Mackey: Q. Mr. Stakset, I have here a list of [181] materials on the letterhead of Cincotta Brothers, dated October 13, 1944, and identified at the top as ‘Purchases made by the M/S Midnight Sun during the year 1940.’ Will you look at that list?

“Mr. Whelan: I am going to object to that on the ground it is too remote.

“Mr. Mackey: Q. Will you look at that list and see if that will refresh your recollection as to the purchase that you made from Cincotta Brothers in 1940?

“A. That is pretty hard to remember.

“Q. Do you know Mr. Ernst down there at Cincotta Brothers? A. The timekeeper?

“Q. Yes. A. Yes.

“Q. You saw that list down there yesterday when we were talking it over with—you and I with Mr. Ernst? A. Yes.

(Deposition of Henry Stakset.)

“Q. Will that refresh your recollection as to the purchases that you made down at that place in 1940? A. I cannot remember that.

“Q. Would you look over that list and see if you remember any purchases that you made at Cincotta’s that is not on that list; I mean purchases made in 1940.

“A. I can’t remember all those small things.

“Q. Your purchases from Cincotta Brothers were only things that you happened to find that you would need during the fishing season after you got down here, weren’t they? [182] A. Yes.

“Q. Will you look at that list and see if that fairly represents about the type of thing and the amount of purchases you would make from Cincotta Brothers in a season?

“Mr. Whelan: Objection. The witness has testified he can’t remember.

“The Witness: I can’t tell exactly.

“Mr. Mackey: Q. I am trying to get you to tell me whether that fairly represents about the type of thing that you would purchase from Cincotta Brothers during the season down here.

“A. Well——

“Q. I don’t mean to say that you have to purchase each one of those items, but does that fairly represent what you purchased?

“A. Some years may buy more than others; if you happen to tear a seine or anything you buy more than in other years. There are lots of small things there.

(Deposition of Henry Stakset.)

“Q. Well, you bought lots of small things of that sort, didn’t you, from Cincotta Brothers from time to time?

“A. When we need them we buy them, yes.

“Q. Doesn’t that represent about the type of thing you would buy from them?

“A. Well, it must be. I can’t remember all those things, there.

“Q. Tell me whether that is about the type of thing that you would go in there and buy.

“A. Well, that is the type of thing, but some years [183] you buy quite a bit.

“Q. I appreciate that. I wouldn’t try to get you to say that exactly represents what you bought, but is that about the kind of thing, the kind of purchase that you would normally make down there? A. Well, some of it, yes.

“Q. Well, is there anything on there that you would not normally buy?

“A. Well, when you need it you buy it. I can’t tell what is——

“Q. Well, can you refresh yourself on these items of September 25, 1940, under that group, totaling \$3.46? A. Yes.

“Q. You would sometimes buy that kind of thing at Cincotta Brothers during the season?

“A. Yes.

“Q. Then for September 29, 1940, I see items of marine glue, patches, tape, a 6-inch purse block, and some galvanized screws and boat nails, totaling \$9.01; you would normally buy that kind of thing?

(Deposition of Henry Stakset.)

"A. Yes.

"Q. Wouldn't you, when you came down here?

"A. Yes.

"Q. The same type of thing occurred on September 1st, October 1st, rather, totaling \$6.32; that is about the type of thing? A. Yes.

"Q. Some flashlight batteries and manila rope on October 21st, totaling \$7.25. October 24th I see 16 pounds of 3½-inch 3-strand bolt rope, 69 pounds of [184] 54 by 1½ by 200 netting, 58 cents a pound, total for that day being \$47.38. That is a fairly large purchase for that day.

"A. Yes. That is a brailer.

"Q. Yes, that is a brailer. On October 28th, diaphragm pump washer, \$2.22. This, generally, represents the kind of thing you would be buying there? A. Yes, small things.

"Q. And I see here on November 11 you purchased 149 pounds of 16-fathoms 15-thread 1⅜ by 400 netting 6400 mesh. A. Yes.

"Q. 74 cents a pound; \$136.15 being the purchase on that day. Does that fairly represent about the kind of things you would be buying?

"A. Yes, sir.

"Q. I call your attention to the fact that the total for the 1940 purchases, including January of that year, was \$440. Is that about what it would run? A. I can't remember."

The Court: Go down to the recross examination, line 16.

(Deposition of Henry Stakset.)

“Recross Examination

“Mr. Whelan: Q. Mr. Stakset, when you start out on a fishing trip you usually start from Tacoma?

“A. Seattle.

“Q. At that time you usually make all the purchases and replacements of equipment before you start out? [185] A. Yes.

“Q. Whom do you usually buy your equipment from at that time?

“A. Oh, the stores up in Seattle, there.

“Q. Would that be the Pacific Marine Supply Company? A. Yes.

“Q. Nordby Supply Company?

“A. Yes, and Seattle Ship Supply.

“Q. When you go into Cincotta Brothers that is just for small things; isn't that right?

“A. That is when you are fishing.

“Q. You are just going in and making purchases of what you actually need; isn't that correct?

“A. That is correct.

“Q. And all the equipment that you need, including netting, has already been purchased before you start out on your fishing trip? A. Yes.

“Q. So if you make any purchases of netting from Cincotta Brothers it is either for the purpose of repairs or for replacement at that time between fishing trips into San Francisco and then out again?

“A. That is correct.

“Mr. Whelan: That is all.

(Deposition of Henry Stakset.)

“Further Redirect Examination

“Mr. Mackey: Q. The price that you paid for netting varied according to the number of threads in the netting, and the mesh, didn't it?

“A. Yes. [186]

“Q. So you cannot say that all netting is so much a pound? A. No.

“Q. I believe you testified a little while ago this netting was so much a pound, but I don't know what netting you had in mind; I don't know how much you said——

“A. It all depends what year it was.

“Q. And also on the netting?

“A. The netting, yes.

“Mr. Whelan: I think he testified that in 1938, at the time he was making his purchase of netting for replacement, that he paid 80 cents per pound.

“Q. What netting did you have in mind?

“A. That was the netting for the seine, $1\frac{3}{8}$ inches.

“Q. How many pounds?

“A. Just a few cents difference, I think.

“Q. What thread netting did you have in mind at 80 cents? A. 9-thread.

“Q. $1\frac{3}{8}$ inches? A. Yes.

“Q. Is that the 400 mesh? A. Yes.

“Q. Now, there is one item that I overlooked asking you about, and I don't understand it. I see on this list, Stakset Exhibit No. 1, some pen boards. It is the seventh item from the bottom on the first page on this Stakset Exhibit No. 1. What are your pen boards?

(Deposition of Henry Stakset.)

“A. We use pen boards in the hold to keep the fish [187] from sliding, and sometimes I guess you would call it drain boards; that is to keep the fish from not going over the side:

“Q. What are they, just planks?

“A. Yes, planks.

“Q. What are the sizes of the planks?

“A. Well, about $2\frac{1}{4}$ by 12.

“Q. $2\frac{1}{4}$ by 12 inches; how long?

“A. Well, that is according to the length of the hold in the boat.

“Q. Those pen boards used in the hold run fore-and-aft on your boat? A. Yes.

“Q. They divide the hold in half?

“A. Yes.

“Q. How long was your hold?

“A. About 38 feet.

“Q. 38 feet? A. Yes.

“Q. Would your pen boards be that long, or would you have to use two or three boards?

“A. Have to use two or three.

“Q. Two or three lengths.

“A. And extensions between.

“Q. Do you think these pen boards would be 12 feet long? A. Some of them, yes.

“Q. Some are purchased like that?

“A. Yes.

“Q. Are any of them longer than that? [188]

“A. No, not longer.

“Q. How high were the pen boards in the middle of the ship?

(Deposition of Henry Stakset.)

"A. About seven or eight feet.

"Q. So what that was was 2 by 12 planks?

"A. Yes.

"Q. Is that rough surface?

"A. No, that is planed and painted.

"Q. Planed and painted. A. Yes.

"Q. And 2 by 12 planks laid on edge so as to go up seven or eight feet, and so as to go the length of a hold, about 38 feet? A. Yes.

"Q. Now, would you call those pen boards or——

"A. Well, we call them deck planks, too; sometimes call them pen boards, and sometimes call them deck planks.

"Q. The same kind of boards.

"A. We had $2\frac{3}{4}$ inches thick by 12.

"Q. $2\frac{3}{4}$ by 12? A. Yes.

"Q. You use those along the railing on a ship?

"A. Yes.

"Q. About how many of those would you have on deck?

"A. We had four lengthwise and about six crosswise.

"Q. Those would be $2\frac{1}{4}$ inches thick, 12 inches wide, and about 12 feet long?

"A. Well, the boat was 20 feet across; say 16 feet lengthways.

"Q. I am trying to get about how many boards there [189] would be 12 feet long; about how many boards would there be if they are on the boat 12 feet long?

(Deposition of Henry Stakset.)

"A. I would have to figure that out. About eight or ten boards, I guess, on the deck.

"Q. What were these, fir boards? A. Yes.

"Q. Where is Mr. Hanney now, do you know?

"A. He is in Monterey.

"Q. Have you seen him since you have been down here? A. Yes.

"Q. Where is Mr. Mikelsen?

"A. He is in San Francisco, here.

"Q. Is he with you now on the same boat?

"A. No, he is fishing on his own boat.

"Q. Have you seen him?

"A. Yes, I saw him once.

"Q. Was that Mr. Mikelsen down there at Cincotta's the other day when I was down there?

"A. I saw him the same day, but I don't know if he was there.

"Q. How long have you known him?

"A. Oh, I know him since 1937, I think.

"Q. I called with you about a month ago, didn't I? A. Yes.

"Q. Then I talked with you again yesterday?

"A. Yes.

"Q. You have talked with Mr. Whelan here about this case, haven't you? A. Yes.

"Q. That was yesterday? [190] A. Yes.

"Q. When did you come in to San Francisco this last trip?

"A. It was Friday we came here.

"Q. When did you talk to Mr. Whelan?

"A. That was yesterday morning.

(Deposition of Henry Stakset.)

“Q. You did not call me, though, did you?

“A. No; I was so busy I don’t know who to call first.

“Mr. Mackey: That’s all.”

The Court: This deposition is received as part of the case in chief of the Plaintiffs.

Further proceedings in the case are continued until two o’clock this afternoon. The jury may now retire until that time.

(Whereupon, at 12:20 p.m., a recess was taken herein until 2:00 p.m., November 1, 1944.) [191]

Mr. Maloy: Mr. Duren, will you again take the stand?

H. T. DUREN,

recalled as a witness in behalf of the Plaintiffs, being previously duly sworn, testified further as follows:

Direct Examination (Continued)

By Mr. Maloy:

Q. Mr. Duren, you have stated that Mr. Cochran suggested that you write him in presenting a claim on behalf of the Plaintiffs, is that correct?

A. Yes.

Q. And did you thereafter write him a letter?

A. I did.

Q. You are handed Plaintiffs’ Exhibit 4 for identification, Mr. Duren. Will you state what that is?

(Testimony of H. T. Duren.)

A. That is a letter dated June 8 to the Franklin Fire Insurance Company of Philadelphia, Dexter Horton Building, Seattle, attention of Mr. Ed Cochran, Marine Manager.

The Court: Not quite so much detail.

Mr. Maloy: Don't read it.

The Court: Just answer the question.

A. Well, the letter is signed by the firm.

Q. By whom? [211] A. By myself.

Mr. Maloy: I will offer the letter in evidence with the two portions deleted.

The Court: I would like to know if it is the letter he mentioned when he was on the stand before.

Q. (By Mr. Maloy): Signed by yourself, or by the firm?

Q. (By Mr. Maloy): Is that the letter you mentioned before that you wrote to the Franklin Fire Insurance Company on June 8?

A. Yes, it is.

Q. And you wrote that on behalf of the Plaintiffs? A. I did.

Q. At their request? A. I did.

Mr. Maloy: I will offer the letter with the excluded portions eliminated, your Honor.

Mr. Stafford: My objection is already stated.

The Court: Yes, and subject to what the Court already said, this Plaintiff's Exhibit 4 is admitted in evidence.

(Whereupon, Plaintiff's Exhibit 4 for identification was admitted in evidence.)

(Testimony of H. T. Duren.)

PLAINTIFFS' EXHIBIT No. 4

(Letterhead)

Hansen & Rowland Inc.

Tacoma, Washington

June 8, 1942

The Franklin Fire Insurance Co. of
Philadelphia, Pa.

Dexter-Horton Building
Seattle, Washington

Attention: Ed Cochrane, Marine Manager

Re: Your Policy No. 44298—Peter Peter-
sen dba Marine View Boat Building
Company, Builder and Oluf B. Han-
ney, Owner—Builders' Risks Insur-
ance on Hull No. 20

Gentlemen:

You will recall the writer was in your office a few days ago, and informed you certain equipment and property purchased by Mr. Hanney for Hull #20 was destroyed by fire during the currency of Policy #44298, and while Hull #20 was under construction.

You no doubt are aware a large fishermens storage warehouse of the Port of Seattle, located at Fishermens Dock in Ballard, suffered a disastrous fire some time ago. At the time of this fire, Mr. Hanney had under rental to him a storage locker in this warehouse. During the course of construction of Hull #20 Mr. Hanney purchased different ma-

(Testimony of H. T. Duren.)

terial and equipment for the vessel and stored it in the locker referred to. The fire in the warehouse consumed this material and equipment, and it is the contention of Mr. Hanney, he is entitled to recover the resulting loss under your policy #44298.

The policy recites under Clauses for Builders' Risks, "including materials In Buildings, Workshops, yards and docks of the assured, or on quays, pontoons, craft, etc." It is the assured's contention the material was located in building under rental to him, and the property lost was intended for the vessel under construction and covered by the policy.

Attached hereto you will find a schedule of substantially all of the equipment involved, however the value thereof is yet to be determined.

We are presenting this case to you on behalf of Mr. Hanney, who is a client of our office, and we would like you to advise us if you are prepared to accept and acknowledge liability under your policy after which the details and the amount of the loss can be worked out and established.

We have advised Mr. Haney we felt it would be best to take up with you the particulars, and ascertain if you recognize his loss of equipment as an admissible claim under your policy, and if so, we could then work out an equitable adjustment with you, but before going any further we would like from you an expression of your ideas.

(Testimony of H. T. Duren.)

Thanking you for an early acknowledgment, we are

Very truly yours,

HANSEN & ROWLAND, INC.

General Agents

(Signed) H. T. DUREN

H. T. Duren

Manager Marine Department

HTD #3 Encl.

Stamp endorsement: Received Jun 10, 1942, Seattle Office.

- 1 Life-Boat, 5 oars, 4 oar locks
- 1 Seine Canvas—20x20 ft.
- 200 Fathom 4½ inch rope
- 4 Turn Buckle Clamps
- 1 Norwegian Cable—350 fathoms, 5/8"
- 4 tying up lines, 5 inch
- Pan boards—\$250.00
- 1 Double Block, 12 inch
- 2 Single Blocks, 12 inch
- 2 Double Blocks, 10 inch
- 1½ Blocks—10 inch
- 2 Single Blocks, 10 inch
- 1 iron block
- 50 Fathom cable, 5/8"
- 1 Deck hose and nozzle
- 4 Deck Brooms
- 2 Buckets
- 11 Mattresses
- 11 Life Preservers

(Testimony of H. T. Duren.)

50 Fathoms— $3\frac{3}{4}$ rope

50 Fathoms— $3\frac{1}{2}$ rope

20 Fathoms—3 rope

2 purse drums

2 1-inch Shackles

2 $\frac{7}{8}$ " Shackles

2 Double Blocks—7 inch

2 Single Blocks—7 inch

50 Fathoms— $2\frac{1}{2}$ rope

40 lbs. Lead

1 Garbage Can

80 lbs. Rings, Shackle, Hooks

1 8" cleat

2 Hoops

Mr. Maloy: I would like to read the letter to the jury. Of course, I will not read the two portions that we have talked about.

The Court: You may now read it to the jury.

(Whereupon, Mr. Maloy read Plain- [212]
tiffs' Exhibit 4 to the jury.)

Mr. Maloy: Attached to that is a list of the equipment which is described in the inventory, which is Plaintiffs' Exhibit No. 2. I shall not read that again.

(Testimony of H. T. Duren.)

Q. (By Mr. Maloy): Now, Mr. Duren, did you receive an answer to the letter which has been identified here as Plaintiffs' Exhibit 4 and which I have just read to the jury? A. I did.

Q. What is Plaintiffs' Exhibit 5?

A. It is a letter dated June 18 to Hansen & Rowland.

The Court: Try to avail reading from it. Just answer the question.

Q. (By Mr. Maloy): Who is it addressed to and who signed it?

A. It is addressed to Hansen & Rowland, Inc., attention of myself, and signed by E. E. Cochran, Marine Manager.

Mr. Maloy: I would like to offer that in evidence, please.

The Court: The Court would like to know from the witness if that is the letter which he had just previously mentioned as being the reply to his letter?

Mr. Maloy: I asked him that question. I will ask it again.

Q. (By Mr. Maloy): Is that the answer to your letter of June 8? [213] A. It is.

Mr. Stafford: My objection is already a matter of record.

The Court: And are you familiar sufficiently with the document—

Mr. Stafford: (Interrupting) I have never seen the original.

(Testimony of H. T. Duren.)

The Court: Will you let opposing Counsel see that?

Mr. Maloy: You have a carbon copy of it, haven't you?

Mr. Stafford: I said I had never seen the original.

The Court: The objections have already been noted, and the Court's ruling thereon made. Plaintiffs' Exhibit 5 is now admitted in evidence.

(Whereupon, Plaintiffs' Exhibit No. 5 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 5

(Letterhead)

The Franklin Fire Insurance Company
of Philadelphia
Pennsylvania
Seattle, Washington

June 18th, 1942

Hansen and Rowland, Inc.

Washington Building

Tacoma, Washington

Attention: Mr. H. T. Duren, Manager, Marine
Dept.

Re: Peter Petersen d/b/a Marine View
Boat Building Co., Builder & Oluf F.
Hanney, Owner Pol. #44298
Loss—Feb. 1942.

Gentlemen:

Receipt is acknowledged of your letter of June 8th, in which you advise that it is the contention

(Testimony of H. T. Duren.)

of Mr. Hanney that he is entitled to recover, under the above-numbered policy, for the loss of material and equipment in a fire which destroyed large fishermen's storage warehouse of the Port of Seattle, where Mr. Hanney had a storage locker.

We are of the opinion that the assured does not have a claim under this policy on account of the loss described in your letter of June 8th and we expressly reserve all rights and defenses under the policy.

With that reservation in mind and without intending any qualification of that reservation, we make the following additional comment on the contents of your letter of June 8th:

The loss described in your letter occurred as a result of the destruction by fire of a dock owned by the Port of Seattle and in which the assured was the tenant of a storage locker. In this locker the assured states that he had stored material and equipment intended for use in the construction of Hull #20 and it was this material and equipment which was destroyed in the fire.

You quote a clause under "Clauses for Builders' Risks" of the policy, particularly the words "including materials in buildings, workshops, yards and docks of the assured. . . .". You then state that this language covers material in a building of which a portion is rented to the assured.

It is our position that your interpretation of this policy in effect deletes from the clause the words "of the assured". If these words mean any-

(Testimony of H. T. Duren.)

thing they mean what they say; namely, the buildings, workshops and yards over which the assured has complete domination. The policy was clearly never intended to cover material placed in lockers in any building, regardless of type of hazard.

We trust that Mr. Hanney will understand why his loss does not constitute a proper claim under our policy, as the materials which he lost were not in buildings, workshops, yards or docks, or on quays, pontoons, craft or similar property, owned by him.

Yours very truly,

C. E. COCHRANE

Marine Manager

CEC-HAR

Mr. Maloy: I should like to read it to the jury, if it please your Honor.

The Court: You may now read it to the jury.

(Whereupon, Mr. Maloy read Plaintiffs'

Exhibit 5 to the jury.)

Mr. Maloy: You may cross-examine.

Mr. Stafford: No questions.

Mr. Maloy: That is all, Mr. Duren. [214]

The Court: You may be excused, and there is no objection to the Court excusing this witness permanently?

Mr. Stafford: None on the part of the Defendant.

(Testimony of H. T. Duren.)

The Court: You may be excused from further appearing as a witness at this time.

(Witness excused.)

[215]

The Court: Call your next witness.

Mr. Maloy: I will call Mr. Paul Vohl.

PAUL VOHL

one of the Plaintiffs, called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Will you please state your name?

A. Paul Vohl.

Q. Where do you live?

A. In Seattle, Washington.

Q. How long have you lived here?

A. I lived here 20 years.

Q. 10 years? A. 20 years.

Q. 20 years? Speak up distinctly so that the jury can all hear you, Mr. Vohl. What has been your business during such period of time?

A. Fishing.

Q. What kind of fishing have you been engaged in?

A. Well, at first it was halibut fishing, and now I am sardine fishing.

Q. Have you been engaged in any other kind of fishing? A. No.

(Testimony of Paul Vohl.)

Q. Just sardine and halibut? Are you acquainted with Hans Mikelsen, one of the Plaintiffs in this case? A. Yes.

Q. And with Oluf B. Hanney? [216]

A. Yes.

Q. Did you, during the summer of 1941, become interested with them in any venture or business?

A. Yes.

Q. What was it? A. Building a boat.

Q. What boat was that, Mr. Vohl?

A. It was the boat Trade Wind.

Q. The Trade Wind? A. Yes.

Q. That is what you call it now, isn't it?

A. Yes.

Q. When it was being built, how was it described? A. It was Hull No. 20

Q. That fishing boat was being built over at Brown's Point, Tacoma? A. Yes.

Q. Now, during the summer of 1941, did you and your partner acquire any fishing gear and equipment from anyone? A. Yes.

Q. From whom? A. Mr. Stakset.

Q. Is that Mr. Henry Stakset?

A. Yes, sir.

Q. Of Tacoma? A. Yes.

Q. What did you buy from him, if anything?

A. We bought fishing gear, netting and purse lines and cork.

Q. About when did you purchase this personal property from him? [217] A. In August.

Q. Of what year? A. '41.

(Testimony of Paul Vohl.)

Q. Before you purchased it from Mr. Stakset, did you examine or inspect it? A. Yes.

Q. Where was it then located?

A. It was at Salmon Bay Terminal, Locker 325.

Q. Is that a place where Mr. Stakset had previously stored it? A. Yes.

Q. Did you examine or inspect the material and equipment before you purchased it, alone or with somebody else?

A. With Mr. Mikelsen.

Q. Mr. Hans Mikelsen? About when did you inspect it?

A. Well, I would say it was in July, before we bought it. I wouldn't know the exact date.

Q. What did you and Mr. Mikelsen do in order to inspect it?

A. Well, we took it out of the salt, especially the netting that was in the salt. That was the main thing.

Q. You speak of the salt. What had the salt to do with it?

A. Well, the netting was salted down, covered with salt.

The Court: May I ask you, Mr. Vohl, every time you speak, speak as distinctly as you can, and keep your voice raised, because sometimes it is difficult for us to hear distinctly your words. So have in mind to pronounce your words as distinctly as you can.

Q. (Mr. Maloy) What is the purpose of salting the webbing down?

(Testimony of Paul Vohl.)

A. For keeping the webbing. [218]

Q. Was this webbing salted down when you inspected it? A. Yes.

Q. And after you had inspected it, what did you do with the webbing?

A. We put it back again, covered it with salt.

Q. Did you salt it down after you put it back?

A. Yes.

Q. What was the condition of the webbing when you and Mr. Mikelsen inspected it?

A. It was in first-class condition.

Q. Did you test it in anywise during your inspection and examination of it? A. Yes.

Q. Tell the jury what you did to test it.

A. Well, testing netting, you take the netting between your hands. If you can't tear it, it is in good condition, first-class condition. You use your strength of tearing it.

Q. You use your strength and try to tear it, is that it? A. Yes.

Q. Did you examine the other equipment which was in the locker? A. Yes.

Q. Did you take part in the making up of an inventory of the fishing gear and equipment which was in Locker 325? A. Yes.

Q. Was such an inventory prepared?

A. Yes.

Q. Who prepared it? Who prepared the inventory? Who made up the list? [219]

A. Well, I don't know who made the list, but we were there.

(Testimony of Paul Vohl.)

Q. You checked over this list?

A. Checked over it.

Q. I will hand you Plaintiffs' Exhibit 2 and ask you if that is the inventory which was made up?

A. Yes, that is it.

Q. And that is a list of the property that you and Mr. Mikelsen examined in Locker 325?

A. Yes.

Q. Now, in that list are described other pieces of equipment, such as purse wire and webbing. Was any of the webbing new?

A. Yes, there was what you call one bale of webbing new. That is around 160 fathoms, I would say.

Q. Was any other of that property new?

A. Yes, the purse cable.

Q. The purse cable? Is that what is referred to as purse wire? A. That is right.

Q. What kind of purse wire was that? Do you know of what manufacture? Was it made in this country or somewhere else?

A. No, it was Norwegian cable.

Q. Is that good purse wire? A. Yes.

Q. And was that new?

A. Brand new. It hadn't been used.

Q. Were there any other items of property included in that list comprising Plaintiffs' Exhibit 2 which was new?

A. There was some new ropes, manila ropes.

[220]

Q. New manila ropes? A. Yes.

(Testimony of Paul Vohl.)

Q. What was the condition of the manila rope?
What was its condition?

A. They were in good condition.

Q. There were some purse drums in that list.
What was the condition of those?

A. They were in good condition.

Q. The shackle bolts and the various other items
there, what was the condition of all of it?

A. They were all in good condition.

Q. What was the condition of the cork?

A. Good corks.

Q. What was the condition of the Montara
bags?

A. They were also in good condition.

Q. Was that personal property, then, after you
had examined it, put back in the locker?

A. Yes.

Q. Did it stay there until the fire which burned
it up? A. Yes.

Q. Did you have occasion at any time to see it
between the time that you inspected it prior to your
purchase of it and the time of the fire?

A. Yes, we were in a few times looking at it,
but that is all.

Q. Was there any change in the condition of it
between the time you first inspected it in 1941 and
the last time you saw it? A. No.

Q. When was the last time you saw it, do you
think? [221]

A. That I couldn't say offhand. We went in
once in a while.

(Testimony of Paul Vohl.)

Q. You aren't able to state the last time, approximately? What month? Could you state that?

A. Well, I would say in January.

Q. You would say in January of what year?

A. '42.

Q. Mr. Vohl, did you have anything to do with securing the issuance of this Builders Risk Policy which you are suing on in this case?

A. Yes.

Q. Did you have anything to do with the renewals of that policy from time to time?

A. Yes.

Q. When did you have any advice with the insurance company concerning its renewal?

A. In November, '41.

Q. Tell us what you did and who you saw about renewing it.

Mr. Stafford: Now, if your Honor, please, I object on the ground that there is no issue as to which parol evidence should be admitted here; on the ground that we have admitted that the policy was renewed from time to time and was in force at the time of this fire, there being no issue to which this testimony can go at all.

The Court: What is the purpose, if you will state it briefly?

Mr. Maloy: Well, my information is that Mr. Vohl went up there—you see, the policy was for three months——

Mr. Stafford (Interrupting) If this is going to be an offer of proof——

Mr. Maloy (Interrupting) No, it isn't going to be [222] an offer of proof. Don't be so touchy, Mr. Stafford. I am simply going to state that he went

(Testimony of Paul Vohl.)

up there and had a talk with Mr. Wheelock about renewing the policy. In that conversation some remarks were made which I think bear upon the interpretation of this policy.

The Court: So it is upon that question of interpretation that you make the offer?

Mr. Maloy: Yes, your Honor.

The Court: That you seek to inquire?

Mr. Maloy: Yes, the surrounding circumstances.

The Court: Do you wish, then, to register your objection?

Mr. Stafford: Oh, yes; by all means, your Honor. I want the record to show that the defendant objects to the admission of any such testimony on the ground that, as I have so frequently stated in this trial, there is no issue here requiring the admission of parol evidence, and—oh, I think I have elaborated on that objection so long that the record must be rather clear on it.

The Court: The objection is noted and overruled. I would make this suggestion, if you find that there is more than one way of getting at the matter, the shortest way would be the best.

Q. (Mr. Maloy) I shall ask Mr. Vohl to state what took place when he went up there in connection with the renewal of the policy, and what conversation took place, if any.

Mr. Stafford: The same objection, if your Honor please.

The Court: Overruled.

(Testimony of Paul Vohl.)

Mr. Stafford: A violation of the parol evidence [223] rule.

Q. (Mr. Maloy) Have you the question in mind, Mr. Vohl?

A. Yes, I went up to Mr. Wheelock's office in November, 1941 and asked him about this policy. It was just those three months was just overdue, you know, it was just ready for renewal, rather, and I went up and talked to him to renew the policy; and he says, "All right", and I also asked him about the stuff we had stored at the Fishermen's Dock in Ballard, if that was also covered, and he says, "Yes".

Q. Did you have any further talks with him after the conversation you have detailed in November respecting renewal of the policy?

A. No.

Q. Or regarding the property at Locker 325 or elsewhere? A. No.

Q. Now, I want to go back a minute to your examination of this webbing. When you and Mr. Mikelsen examined it, did you observe whether or not it had been tarred, treated with tar?

A. It has been tarred, yes.

Q. It had been? What is the purpose of having the webbing tarred?

A. You always tar the webbing when it is new.

Q. What is the purpose of it?

A. So it keeps.

Q. To preserve it, is that right?

A. That is right.

(Testimony of Paul Vohl.)

Q. This vessel you mentioned as being the Trade Wind—which was the name you gave to Hull No. 20, wasn't it? [224] A. Yes.

Q. What kind of a fishing vessel is that?

A. That is what you call a combination fishing vessel, but mostly for sardines.

Q. Now, in your experience as a fisherman, Mr. Vohl, have you bought and sold webbing and other fish gear and equipment? A. No.

Q. You never have? Have you been present when webbing and other fish gear has been purchased? A. Yes.

Q. Do you know and are you in a position to state the value of this webbing and equipment which is described in Plaintiffs' Exhibit No. 2?

A. Yes.

Q. What was its value on February 24, 1942?

A. That was worth then \$12,000.

Q. Do you know whether or not webbing and fishing gear and equipment such as this was scarce at that time? A. Yes.

Q. Can you state what that was due to, the cause of it? A. Well, the war.

Q. On account of the war? A. Yes.

Mr. Maloy: I don't think of anything else right now, your Honor. There may be a question or two later. I would like to reserve the right to recall him, if necessary.

The Court: You may cross examine. [225]

(Testimony of Paul Vohl.)

Cross Examination

By Mr. Stafford:

Q. You went fishing on this vessel in the year '42, didn't you? A. Yes.

Q. You bought all of this equipment for that vessel, to replace what was burned that year, didn't you? A. We replaced it, yes.

Q. That is right, and what did it cost you brand new at that time? A. \$12,000.

Q. Isn't that the reason why you say this second-hand stuff was worth \$12,000?

A. Because it was new. This fishing gear has to be new.

Q. Do you know how old this fishing gear was that was in the locker? A. Yes.

Q. When was the seine originally bought?

A. In '37.

Q. That was the same seine, except for replacements from time to time, that you bought, wasn't it? A. Yes.

Q. And you bought the whole works for \$4,000, didn't you? A. That is right.

Q. And yet, between September, 1941 and February, 1942, it increased \$8,000 or 200% in value?

A. No.

Q. That is your testimony, isn't it? You say it was worth \$12,000 on February 24?

A. That is right. [226]

Q. And that you paid \$4,000 for it in September? A. That is right.

Q. And it was then four years old?

(Testimony of Paul Vohl.)

A. Yes, but he could have gotten \$8,000 for it.

Mr. Stafford: I have no other questions.

Redirect Examination

By Mr. Maloy:

Q. What was it worth when you bought it, Mr. Vohl?

A. It was worth \$8,000.

Mr. Maloy: I think that is all.

Recross Examination

By Mr. Stafford:

Q. It was worth \$8,000, and Mr. Stakset and his nine partners sold it to you as a special concession for \$4,000?

A. That is right.

Mr. Stafford: I have no further questions.

Mr. Maloy: That is all, Mr. Vohl.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Maloy: I will call Mr. Mikelsen. I will recall him for a question.

The Court: Mr. Mikesen is recalled to the stand. He has already been sworn. [227]

HANS MIKELSEN

one of the Plaintiffs, recalled as a witness, being previously duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Mr. Mikelsen, I overlooked asking you a question or two. Did I ask you about the web, whether the webbing, when you and Mr. Vohl examined it, had been tarred?

A. No, you didn't.

Q. Well, what is the fact as to whether, when you and Mr. Vohl inspected it before you bought it from Mr. Stakset, as to whether that webbing had been treated with tar?

A. Yes, it has been treated.

Q. What is the purpose of treating it with tar?

A. To preserve it.

Q. Now, do you know whether or not webbing and other fishing gear, such as described in the inventory that was made by Mr. Stakset and yourself, whether there was any scarcity of that during the fall and winter of 1941-42?

A. Yes, very scarce.

Q. Can you state the reason why?

A. On account of the war.

Q. Was it difficult to get new material of that type? A. Yes.

Q. Now, when the various clauses of this insurance policy were read to you by Mr. Wheelock, which you testified to the other day, and he told you that those clauses covered this material, did you believe him?

(Testimony of Hans Mikelsen.)

Mr. Stafford: Now, just a moment, if your Honor [228] please. That is not a proper question. It is leading. Counsel has no——

Mr. Maloy: (Interrupting) The question is whether or not he believed him. I am only directing his attention to some testimony that he gave yesterday.

Mr. Stafford: Counsel has no right to recall the Plaintiff in this case and say, “No, you testified so and so yesterday. Is that true?”

Mr. Maloy: I did not ask him that. Mr. Stafford, I did not ask him that. I asked him whether or not he believed what Mr. Wheelock told him.

The Court: Do you understand that the inquiry goes to the witness’ reliance or non-reliance upon Mr. Wheelock’s statement?

Mr. Maloy: Exactly so.

Mr. Stafford: Now, if your Honor please, I had hoped that we wouldn’t run into another one of these, but we are there again.

The Court: Very well, the jury will be asked to retire.

(Whereupon, the jury retired to the jury room, and the following proceedings occurred without their presence and without their hearing:)

Mr. Stafford: Now, if your Honor please, there is absolutely no issue in these pleadings at this time to which the question of the reliance of the Plaintiffs is [229] material or has any part, but

(Testimony of Hans Mikelsen.)

the inquiry is particularly dangerous because of the peculiar situation of the pleadings in this case.

Your Honor will recall that the original complaint in this case contained two causes of action. One was a suit on the policy as written. That was the first cause of action, and that is still right in front of the Court in this case.

The second cause of action was a suit for the reformation of the policy on the ground of misrepresentation by Mr. Wheelock.

Now, of course, I will concede that if the suit for reformation was still before this Court, then the question of reliance, the right to rely and detriment because of reliance on representations, are important matters of inquiry; but since that original complaint was filed, Plaintiffs' Counsel by his own affirmative act, and not from any motion of ours, voluntarily dismissed that second cause of action, so that there is in this case today only one cause of action, and that is the Plaintiffs' suit on the policy as written. He says that this loss is covered under the policy as it is written.

Now, under that state of the pleadings, what does it matter whether Mr. Mikelsen or Mr. Hanney or Mr. Vohl relied upon anything that Mr. Wheelock had to say, believed what Mr. Wheelock had to say, or didn't believe him? What difference does it make?

They are saying, "We have a written contract with you. You owe us money under it."

There is no question, no issue of reliance, no

(Testimony of Hans Mikelsen.)

issue [230] of right to rely, and no issue of damages because of reliance that can possibly be dragged into this case.

The Court: Is the reliance of the party conduct of the party? It is competent, according to the Plaintiffs' contention, as I understand, to produce testimony as to the conduct of the Plaintiffs as bearing upon their interpretation.

Mr. Stafford: Now, if your Honor please, the only response that I can make to that suggestion is this: When the parties bring a suit on a contract as written, they are in effect, inevitable effect, affirming that that contract constitutes a binding agreement upon which they have a right to recover.

Now, the only question which Mr. Maloy has contended for in this case, which your Honor has found exists, and which we have consistently denied exists in this matter, is the question of the intent of the parties as expressed in describing the subject matter of this insurance. That is not my statement of the only issue; that is Mr. Maloy's statement.

Now, the normal manner of arriving at the intention of the parties to a written agreement is to look at the agreement and give the words used their ordinary meaning, the meaning that they would have to an ordinary man.

That failing, and an ambiguity shown, parol evidence becomes admissible, solely for the purpose of

(Testimony of Hans Mikelsen.)

explaining the ambiguity, not of adding to or extending the intent.

Now, we have Mr. Maloy offering—ostensibly I must look at it this way—he is offering it, as I imagine he is offering all of his evidence, as explanatory of this [231] ambiguity; and what does he offer? He offers a psychological reaction of Mr. Mikelsen, completely secret, and entirely unilateral, as evidencing what? As evidencing the bilateral intent of two parties to a written agreement.

The Court: Do you think it would be proper to ask the Examiner to ask this witness if he procured any other insurance during the time that this policy was——

Mr. Stafford (Interrupting): I think it would be highly improper. What difference does it make whether he procured other insurance? We don't know whether it has been their habit of insuring. I don't see how any act, unilaterally done—in other words, not done by both parties here—it is true, where parol evidence is properly admissible, prior negotiations between the parties are quite regularly admitted in evidence.

I know of no case and Mr. Maloy has not yet produced any here, which says that how one of the parties felt about it is admissible to show what the intent of both parties was. I haven't seen such a case, and that is what he is asking here. "Did you rely on Mr. Wheelock?"

The Court: I will hear from you, Mr. Maloy.

(Testimony of Hans Mikelsen.)

Mr. Maloy: I think that the witness' belief or understanding here as to what property the policy covered, whether it covered this property in Locker 325, is admissible as part of the surrounding circumstances; and the only way you can arrive at that belief is from the reading of the policy, plus what Mr. Wheelock told him.

The Court: Do you contend that your question calls for his statement of a fact or a condition, rather than [232] a state of the witness' mind?

Mr. Maloy: I think both would be admissible, your Honor, in any event; and I think, in response to your inquiry, we would be able to prove—or, rather, it would be admissible to prove whether they took out other insurance, and why they didn't would be admissible.

The Court: Was there anything else you wished to say now?

Mr. Stafford: No, if your Honor please.

The Court: The Court is of the opinion that this objection should be overruled and that the witness should be permitted to answer this question.

Bring in the jury.

(Whereupon, the jury returned to the jury box, and within their presence and within their hearing the following proceedings were had:)

The Court: All of the jurors have returned to their places as before. Do you have the question in mind? [233]

The Witness: Yes.

(Testimony of Hans Mikelsen.)

The Court: I think, as a reminder to the jury, the question should be read.

Mr. Maloy: I think the question should be read, your Honor.

(Whereupon the last question was read by the reporter.)

Mr. Stafford: The objection has already been made.

The Court: And the ruling thereon, which will stand.

Q. (Mr. Maloy): Go ahead and answer the question.

A. Yes, I believed him.

Q. Did you or your partners procure any other insurance on the material and equipment which was stored in Locker 325 during the time it was stored there? A. No.

Mr. Stafford: Just a moment, Mr. Mikelsen. I object to that as having no bearing whatever on any question properly the subject of investigation in this trial, and is a clear and distinct violation of the parol evidence rule, and is incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Q. (Mr. Maloy): I believe you have already answered the question, haven't you?

A. Yes.

Q. Mr. Mikelsen, there is another detail that I omitted asking you about. When you and Mr. Wheelock were discussing the policy in August, 1941, was there any discussion about the engine?

(Testimony of Hans Mikelsen.)

A. Yes.

Mr. Stafford: Just a moment. The same objection.

The Court: Overruled.

Q. (Mr. Maloy): Where were you purchasing the engine for Hull No. 20?

A. From Washington Iron Works.

Q. And where is that? In Seattle?

A. In Seattle.

Q. Was there any discussion as to whether or not this policy would cover this engine?

A. Yes. When the machine left the factory, it was covered.

Q. That is, when it left the Washington Iron Works? A. Yes.

Q. I am not quite clear on that. You said when it left the factory it was covered?

A. Yes.

Mr. Stafford: The same objection, if your Honor please.

The Court: I want to know if he is stating what somebody said or what he said.

Mr. Maloy: That is what I want to know. That is what I am trying to clear up, your Honor.

Q. (Mr. Maloy): Who stated that it was covered? A. Wheelock.

The Court: The objection as applied to this last is overruled.

Mr. Stafford: I want the objection noted, however, the same objection.

The Court: That is what the court thought.

(Testimony of Hans Mikelsen.)

Mr. Stafford: That is right. [235]

The Court: And so it is noted and overruled.

Mr. Maloy: I think that is all. You may cross examine.

Cross Examination

By Mr. Stafford:

Q. You fished the boat that Peterson built for you in the summer of 1942, didn't you, Mr. Mikelsen? A. Yes, sir.

Q. And you put aboard her similar equipment to that that was burned up in the fire, didn't you?

A. Yes.

Q. You bought it in between the time of the fire and the time you went fishing, didn't you?

A. That is right.

Q. So it wasn't so scarce that it wasn't available, was it?

A. Well, we run from one store to another and picked up pieces here and there.

Q. But you got it? A. Yes, we got it.

Q. That is right; and you heard Mr. Vohl testify that you paid \$12,000 for it brand new?

A. Yes.

Q. Is that true? A. That is right.

Q. Then why is it that you ask for \$14,160 in this lawsuit?

A. Well, it didn't cost that much then as it does now.

Q. Oh, I see. In spite of the fact that you replaced it for \$12,000 brand new, you are still go-

(Testimony of Hans Mikelsen.)

ing according to the current market, and now it is worth \$14,160, is that [236] it?

A. No.

Q. What is it worth now?

A. Well, it is worth between twelve and fourteen thousand dollars.

Q. But it is a fact that you people replaced this stuff for \$12,000 with brand new material, and what you replaced it with was all of American manufacture, wasn't it?

A. That is right.

Q. And it was superior to the Japanese-manufactured stuff that you had bought from Stakset, wasn't it?

A. That is right.

Q. And the whole thing had cost you \$12,000?

A. Well, I haven't gone over it so close.

Q. Well, you heard Vohl testify, and you yourself have testified that you paid \$12,000 for it, and so you sue us for \$14,160. Now, I am asking you why?

A. Well, that is what we thought it cost us.

Q. But you have just said it cost you \$12,000.

A. Just the netting cost \$12,000, but a lot of other things.

Q. Oh, I see. Now, you paid \$4,000 for all this stuff?

A. That is right.

Mr. Stafford: I have no other questions.

Redirect Examination

By Mr. Maloy:

Q. Just a minute, Mr. Mikelsen. I intended to inquire, did you replace all of the property that is

(Testimony of Hans Mikelsen.)

described and listed in the inventory that you and Mr. Stakset made up? [237]

A. Most of it.

Q. Most of it? Was there any substantial part of it that you didn't replace?

A. Yes. We couldn't get manila rope. That is one thing.

Q. You couldn't get any manila rope?

A. That is one thing.

Q. Do you think of any other items that you couldn't get?

A. We couldn't get any Norwegian cable.

Q. You couldn't get any what?

A. Norwegian cable, purse line.

Q. You couldn't get any Norwegian cable? That is what they describe as purse wire, isn't it, in the list?

A. That is right.

Q. Do you think of any other items that you didn't replace?

A. No.

Mr. Maloy: I think that is all.

Recross Examination

By Mr. Stafford:

Q. What did you use in place of manila rope?

A. Sisal, what they call sisal.

Q. Sisal?

A. Yes. It is about 60 per cent.

Q. You didn't use any galvanized wire?

A. Yes, we did.

Q. You bought galvanized wire, didn't you?

A. Yes.

(Testimony of Hans Mikelsen.)

Q. That is better than manila rope for that job, isn't it?

A. Well, things that you can't use rope for, you have to use wire. [238]

Q. Yes, and things that you do use rope for you can also use wire for? A. No, you can't.

Q. You did in this case, didn't you?

A. No.

Q. You didn't replace any of the manila rope with galvanized wire? A. No, we didn't.

Q. I thought you just got through saying you did? A. No, we didn't.

Mr. Stafford: I have no other questions.

Redirect Examination

By Mr. Maloy:

Q. Now, this sisal rope that you speak of, is it as good as manila rope? A. No.

Q. Does it cost as much? A. Yes.

Q. Why did it cost as much as manila rope?

A. Well, on account of the war. Everything went up.

Q. The scarcity of it? A. That is right.

Q. Is it as good as manila rope? A. No.

Q. Well, how much inferior is it? Is it half as good or a third as good or two-thirds as good, or what? A. Oh, about 75 percent.

Q. About 70 percent as good as manila rope?

A. Yes. [239]

Mr. Maloy: That is all.

Mr. Stafford: I have no other questions.

(Testimony of Hans Mikelsen.)

The Court: What are some of the characteristics of manila rope that are superior to the similar characteristics of sisal rope?

The Witness: Well, manila rope would last twice as long as this war rope, what they call sisal.

The Court: It will? Is the manila rope easier to handle?

The Witness: Much easier to handle.

The Court: More flexible?

The Witness: Yes, much easier.

The Court: Is it stronger or less strong?

The Witness: Much stronger.

The Court: Where do they get the sisal material from, the raw material?

The Witness: Well, I couldn't explain that, but I think some of these gentlemen back here could explain that.

The Court: Very well. You may be excused.

Mr. Maloy: That is all, Mr. Mikelsen.

(Witness excused.)

The Court: All are present. You may proceed.

Mr. Maloy: I will call Mr. Smith.

BEN SMITH,

called as a witness on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Would you please state your name?

A. My name is Ben Smith.

Q. You live here in Seattle?

A. I do.

Q. What is your business at the present time, Mr. Smith?

A. I am in the ship chandlery business, outfitting boats and fishing vessels.

Q. With what concern are you connected?

A. I am assistant treasurer of the Fisheries Supply Company.

Q. What is the business of the Fisheries Supply Company?

A. The ship chandlery business and outfitting small boats.

Q. Perhaps the jury doesn't know what ship chandlery business means. Will you explain what ship chandlery is?

A. Ship chandlery is the general outfitting of boats and ships, steamships and fishing boats, of all their gear, cordage and netting, foodstuffs—a complete line of ships' requirements.

Q. How long have you been engaged in such business?

A. A little over eight years.

Q. In the city of Seattle?

(Testimony of Ben Smith.)

A. In Seattle, with this same company. [257]

Q. Are you familiar with the values of fishing gear and webbing generally?

A. Yes, I am.

Q. And were you so advised on February 24, 1942?

A. Yes.

Q. During this period of time that you have been engaged with the Fisheries Supply Company, have you been selling webbing and miscellaneous fishing gear?

A. I have.

Q. I will ask that you be handed Plaintiff's Exhibit 2. I would like to have you look that list over, Mr. Smith. Have you been furnished a list of that property so that you could check and look over the values and so forth?

A. Yes, I have.

Q. Now, Mr. Smith, have you been in the business of buying and selling, or particularly dealing in fishing gear and equipment of the same type and character during your time with the Fisheries Supply Company as described in Plaintiffs' Exhibit 2?

A. I have.

Q. Was there any market value on February 24, 1942 of fishing gear and equipment similar to that of the type described in Plaintiffs' Exhibit 2?

A. Yes, sir.

Q. On February 24, 1942?

A. Yes, sir; there was a market.

Q. Will you tell us what the replacement cost of the list of equipment which is specified and described in Plaintiffs' Exhibit 2 was on February 24, 1942?

(Testimony of Ben Smith.)

A. Well, I figured about \$13,500. [258]

Q. Can you give us an opinion as to its depreciated value or second-hand value, assuming all of such equipment described in Plaintiff's Exhibit 2 was in good condition and had been replaced and kept in good condition, and was in such on February 24, 1942?

A. I would say that that would be about 20% under the replacement value.

Q. 20% under \$13,500? A. Yes.

Q. What amount? Have you computed that?

A. It would be about ten thousand some odd.

Q. Ten thousand some odd? A. Yes.

Mr. Maloy: I think you may examine.

Cross Examination

By Mr. Stafford:

Q. Now, Mr. Smith, you say you have been in the business of buying and selling equipment like this? A. That is right.

Q. Did you ever see Stakset's stuff?

A. I have not seen his merchandise, no.

Q. I can't hear you.

A. I did not.

Q. Do you know anything about it at all?

A. Except from the evidence I have heard here today.

Q. Have you ever bought any used stuff.

A. I have not bought used stuff.

Q. The fact is, you have never bought much of any stuff ex- [259] cept brand new stuff, have you?

(Testimony of Ben Smith.)

A. We deal in boats a lot. They are used.

Q. No, I mean equipment like on Plaintiffs' Exhibit 2.

A. Very seldom. We normally sell new merchandise.

Q. You yourself have never bought any second-hand stuff like this, have you?

A. I have bought second-hand stuff, yes.

Q. Like on that list?

A. Netting, cotton netting.

Q. Cotton netting, but have you ever bought the other items on that list second-hand?

A. There are some items I have, yes.

Q. What is the normal life of a seine, Mr. Smith?

A. The normal life of a seine is a hard thing to determine.

Q. Precisely. You would have to know the particular seine, wouldn't you?

A. A seine that is in good shape and kept up in good shape depreciates in the manner in which I just stated.

Q. How is that?

A. About 20% over new.

Q. In what period of time will it depreciate 20%?

A. Approximately in one year's use.

Q. All right. Now, suppose you have got three years' use. Is it 60%?

A. Not the seine as such. That particular piece of netting might be.

(Testimony of Ben Smith.)

Q. Well, then you couldn't tell, could you, what the value of this stuff was without having seen it?

A. I could not actually tell, but I can go by the evidence of the condition. [260]

Q. All right. Now, precisely what evidence are you going by when you say this was worth \$10,000?

A. The testimony of the previous witnesses as to its general condition.

Q. Precisely what testimony?

A. Of Mr. Stakset and his statement.

Q. Well, I mean the testimony. Not the parties who gave it. What factors are you considering when you say that that stuff, when it burned up, then had a cash market value of \$10,000?

A. They said it was in good condition, and that is——

Q. (Interrupting): That is all you are going by?

A. That is the normal condition of a fishing net.

Q. And that is all you are going by, is it?

A. That is all that you can go by.

Q. And you are excluding the fact that that net was bought in 1937, and was originally Japanese net, aren't you?

A. Would you state that over again?

Q. You are excluding from your computation the fact that this seine was bought originally in 1937 and was a Japanese net, aren't you?

A. I want to know the condition of the net in '42, not '37.

(Testimony of Ben Smith.)

Q. Now, I would like to ask you to answer my question, Mr. Smith. You and I each have different functions in this trial. I am asking you if you did exclude in your figuring the fact that this was a Japanese net and was bought in 1937. Did you figure that when you figured that this was worth \$10,000?

A. I did not figure it as a Japanese net.

Q. Did you figure, Mr. Smith, in arriving at your computation, [261] that Mr. Stakset paid between seven and eight thousand dollars for everything there is listed on Plaintiffs' Exhibit 2?

A. I did not take into consideration his actual cost.

Q. All right. Don't you think that should be taken into consideration, that he bought it new for between seven and eight thousand dollars, in 1937, '38 and '39—that was the new price—and in 1942 it was obviously older than when he bought it. Can you still say it is worth more than \$10,000?

A. Yes, you can.

Q. How?

A. Because it is not as old as you say it is, because that net has been replaced from time to time.

Q. When was the last replacement made in that?

A. I can't say that. I don't know.

Q. Well, if you don't know, how can you say it was made, then?

A. Because they maintained their net, according to their testimony, and replaced it from Cincotta

(Testimony of Ben Smith.)

Brothers and different houses around, so that that net should have been in replaceable condition.

Q. Mr. Smith, you have already admitted that you don't know at all when the last replacement was made in this web?

A. I do not know that.

Q. You have already admitted that you excluded from your computation or figuring the fact that this was a Japanese seine purchased in 1937?

A. That is true.

Q. You have already admitted that you excluded from your [262] figuring the fact that Stak-set paid between seven and eight thousand dollars for all that stuff new? That is right, is it?

A. I don't know a thing about that. What he paid for the net I do not know.

Mr. Stafford: I haven't any more questions.

Redirect Examination

By Mr. Maloy:

Q. I would like to ask you, Mr. Smith, whether during the fall of 1941 and the early part of the year '42 there was any increase in the price of fishing gear and equipment such as described in Plaintiffs' Exhibit 2?

A. If you will pardon me, will that be Japanese netting or American netting?

Q. No, just as it is described there.

A. Well, there has been no increase in price of standard American netting, no.

Q. Since what time? February 24, 1942?

(Testimony of Ben Smith.)

A. No, there has been no increase in cotton netting prices.

Q. In fact, there was a ceiling price put on it, wasn't there, at that time? A. That is true.

Q. The price is the same now as it was then?

A. That is right.

Q. But prior to February 1942, and during the summer and fall of 1941, was there any scarcity or any reason for any scarcity in obtaining such materials?

A. Yes, there was; great scarcity. [263]

Q. What was that due to?

A. Due to the war effort; Lend-Lease.

Q. Are you assuming in your answers to the questions that you have answered that this net was replaced from year to year and kept in good condition and was in good condition on February 24, 1942?

A. Yes, I assumed it was in good condition and replaced.

Q. Now, I figured out—you said that \$13,500 you figured was the replacement value of the property described in Plaintiffs' Exhibit 2, and you figured 20% depreciation. I figured that to be, then—that your valuation would be \$10,800. Have you figured that out?

A. That is pretty close.

Q. Well, will you figure it and see if that is what it is so we can have it in the record?

A. Yes.

(Testimony of Ben Smith.)

Q. 20% from \$13,500? A. \$10,800.

Q. Is that the value you desire to place upon that property described in Plaintiff's Exhibit 2?

A. Yes.

Q. On February 24, 1942? A. Yes.

Mr. Maloy: That is all.

Recross Examination

By Mr. Stafford:

Q. I take it then, Mr. Smith, that you regard the original purchase price, the age and the selling price second-hand [264] as immaterial in arriving at the value?

A. That is right.

Mr. Stafford: I have no more questions.

Mr. Maloy: That is all, Mr. Smith.

The Court: Step down.

(Witness excused.)

Mr. Maloy: The Plaintiffs rest, your Honor.

The Court: Plaintiffs rest. [265]

The Court: Call your next witness.

Mr. Stafford: Mr. Wheelock, would you take the stand?

KENNETH H. WHEELOCK,

called as a witness in behalf of the Defendant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Stafford:

Q. Would you state your name, please, Mr. Wheelock? A. Kenneth H. Wheelock.

Q. What is your business, Mr. Wheelock?

A. I am a local agent in the general insurance business.

Q. With what firm are you connected?

A. It was formerly the Chester J. Chastek Company. About two years ago it was changed over to Chastek & Wheelock.

Q. About how long ago?

A. Approximately 2 years ago.

Q. And that is the name of the firm now?

A. That is correct.

Q. During the month of May, 1941—you heard Mr. Landon testify just now? A. Yes.

Q. Were you introduced to Mr. Hanney during or about that time by Mr. Landon?

A. Yes, I was.

Q. Handing you Defendant's Exhibit A-2, I will ask you to state if you received that letter from Mr. Landon? A. Yes, I did. [271]

Q. And the enclosure attached to it?

A. Yes, sir.

Q. When did you receive that, if you can recall?

A. Well, our office date stamp is on here, May 16, 1941.

(Testimony of Kenneth H. Wheelock.)

Q. Now, about that time did you obtain an order from Mr. Hanney for a bond?

A. About that time, yes. I couldn't state definitely.

Q. What was that bond?

A. That was a performance bond, guaranteeing the performance of a contract entered into between Mr. Hanney and Mr. Peterson of the Marine View Boatbuilding Company for the construction of a fishing boat.

Q. Is that a copy of the contract attached as part of Defendant's Exhibit A-2?

A. Yes, it is.

Q. And was that the contract which formed the basis of the bond which you obtained for Mr. Hanney?

A. That is correct.

Q. Or for Mr. Peterson. I don't know which you obtained it for. Now, did Mr. Hanney give you the order for the Builder's Risk Insurance under that contract also?

A. Yes, he did.

Q. Have you a recollection as to when he told you that you could have that business?

A. Well, I couldn't set the date. The first time that I met Mr. Hanney was in Mr. Landon's office, at which time we discussed only the performance bond and the terms of this contract for the construction of the boat. It was probably, I would say, during the month of May, perhaps about maybe three or four days after this, that I discussed [272] with Mr. Hanney the subject of Builder's Risk Insurance on the boat, and I believe I told him at

(Testimony of Kenneth H. Wheelock.)

that time that that would be a requirement of the surety company, that coverage be furnished during the construction.

Q. And it was in the contract also?

Mr. Maloy: I will object to that as not the best evidence.

The Court: Objection sustained.

Q. (Mr. Stafford): Now, I do not get it straight, Mr. Wheelock, as to whether you fixed the time when you got the order for the Builder's Risk?

A. I don't know as I fixed the time. To the best of my knowledge and belief the actual authorization was given to me perhaps a week after we originally discussed it. I would say possibly the latter part of May.

Q. And the policy was written in August?

A. That is correct.

Q. Why was there the time between the time you got the order and the time it was written?

A. The reason for that, I don't know just how I should explain it, but a performance bond——

Q. (Interrupting): Why wasn't it written? Why wasn't it written when he gave you the order for it?

A. Because construction had not started on the boat, and we would merely be building up an excessive premium where there would be no coverage afforded because there was no construction. The keel had not been laid.

(Testimony of Kenneth H. Wheelock.)

Q. So that the reason it was issued in August was because the keel was laid in August?

A. That is correct. [273]

Q. All right. Now, Mr. Wheelock, you were in court here, I believe, yesterday, when Mr. Mikelsen testified that on August 20, 1941, he had—I have forgotten who else—I thought he said he and Mr. Hanney went to your office and talked to you about some material they were buying from Stakset. Did you at any time, between the time you first met Hanney through Mr. Landon in May of 1941, from that time until after February 24, 1942, ever have any talks with Mr. Hanney, Mr. Mikelsen, Mr. Vohl or any combination of them, or any individual among them, regarding their purchase and insurance of equipment from Henry Stakset which was stored in the Seattle Salmon Bay Terminal, Locker 325?

A. No. I have no recollection of any such conversation at any time with reference to the things that I have heard here in the last two days.

Q. Can you state whether those conversations ever took place?

A. Not pertaining to any of that material that I have heard discussed.

Q. Pardon me?

A. Not pertaining to any of that material.

Q. That is what I mean.

A. I have had conversations with them.

Q. Oh, I didn't mean that. I mean did you have any conversation with any of the Plaintiffs—Han-

(Testimony of Kenneth H. Wheelock.)

ney, Vohl or Mikelsen,—regarding the equipment that is listed in Plaintiffs' Exhibit 2 now in evidence in this case, and generally referred to in this trial as the Henry Stakset equipment?

A. To the best of my knowledge, no.

Q. During the month of February, 1942, and after February 24, [274] 1942, did Mikelsen come to your office and tell you that this material—and by "this material", I mean the material listed in Plaintiffs' Exhibit 2—had burned up in the fire at Salmon Bay Terminal on February 24, 1942, and that he wanted his money under this policy?

A. The records in my office——

Mr. Maloy: (Interrupting): I object to the records in your office.

Q. (Mr. Stafford): No; did he do it?

A. No, sir.

Q. Did he come in and talk to you about it?

A. No, sir.

Q. Did he ever come in and talk to you about it right up until today? A. No, sir.

Q. Did he ever tell you?

A. About that loss, you mean?

Q. About that loss? A. No, sir.

Q. Now, during the month of March, 1942, Mr. Wheelock, what women were employed in your office?

A. I had one young lady whose name at that time was Russnak, now I believe Paulsen, was working full time during that period; and Mrs.

(Testimony of Kenneth H. Wheelock.)

Wheelock was helping us out and working part-time.

Mr. Stafford: If the Court please, I should like at this time to ask when the Court expects to adjourn?

The Court: I expected to adjourn about 5:00. If you are ill, Mr. Stafford, I will be very glad to consider your request. [275]

Mr. Stafford: No, I hadn't that in mind. I was thinking of calling this young lady up. She is down in the Central Building working for West Construction.

The Court: I would like to proceed until about 5:00 today.

Q. (Mr. Stafford): No other women were employed in your office during the month of March, 1942, then? A. No, sir.

Q. Handing you Plaintiffs' Exhibit 1, Mr. Wheelock, I shall ask you to state what this is.

A. This is a Builder's Risk Policy, Form 50 as amended, to Peter Peterson, dba Marine View Boatbuilding Company, Builder, and Oluf B. Hanney, Owner.

Q. That is the policy which you issued or obtained for Mr. Hanney, which you have generally described earlier in your testimony as the Builder's Risk insurance under this contract?

A. That is the policy.

Mr. Stafford: You may cross examine. I may have one or two questions on direct. I don't think

(Testimony of Kenneth H. Wheelock.)

I shall, but I am just trying to save time by going ahead this way.

The Court: Counsel may cross examine.

Cross Examination

By Mr. Maloy:

Q. Mr. Wheelock, I believe you said that you never saw Mr. Mikelsen or Mr. Hanney or Mr. Vohl or any of them in connection with the obtaining of this policy or the issuing of this policy?

A. I don't know that I said that. [276]

Mr. Stafford: I don't recall any such testimony, if your Honor please.

Q. (Mr. Maloy): Well, did you see Mr. Hanney or Mr. Mikelsen or Mr. Vohl between May and August, 1941 in connection with the issuance of this policy which is Plaintiffs' Exhibit 1?

A. I saw Mr. Hanney on a number of occasions during that period.

Q. Prior to the issuance of the policy, and on or about August 20, 1941, did you have a conversation or any conversation with Mr. Hanney in connection with the issuance of the policy and the coverage of the policy?

A. Not in connection with the issuance of the policy.

Q. In connection with what, then?

A. The coverage afforded under the policy.

Q. Did you have any conversation at or about August 20, 1941, relative to the coverage of the policy, with Mr. Mikelsen?

(Testimony of Kenneth H. Wheelock.)

A. I wouldn't be able to fix the date. I do know that on at least one occasion Mr. Mikelsen was in the office with Mr. Hanney.

Q. Was Mr. Mikelsen in the office with Mr. Hanney on or about August 20, 1941?

A. I wouldn't be able to set the date. I can say this, that to the best of my recollection I met Mr. Mikelsen once prior to the time that Mr. Hanney received the policy.

Q. And was that when they were negotiating with you relative to the issuance of the policy?

A. Mr. Hanney did all of the negotiating with me.

Q. Mr. Mikelsen, I take it, was never present then when there were any negotiations or discussions concerning the coverage [277] of the policy?

A. Oh, yes, Mr. Mikelsen was present at one time, once with Mr. Hanney.

Q. When was that, now?

A. I wouldn't be able to set the date.

Q. Well, was it in August, 1941?

A. It was prior to the issuing of the policy. I do remember that.

Q. Well, then, on that occasion you discussed the coverage afforded by the policy which you were going to issue, didn't you?

A. Yes, sir.

Q. And they inquired of you as to what property would be covered by the issuance of the policy which you were contemplating selling them?

A. The order had been given about two months prior to that, sir.

(Testimony of Kenneth H. Wheelock.)

Q. Yes, I understand; but you did discuss the coverage with them, didn't you? A. Yes.

Q. In that conversation you say you discussed the coverage with them. Did you have the form of a policy with you at the time?

Mr. Stafford: Now, if your Honor please, I object to that as not proper cross examination; but more particularly, for the same reason that I have given in other objections to any parol evidence to vary or extend the terms of this policy.

The Court: The objection is overruled.

Q. (Mr. Maloy): Have you the question in mind, Mr. Wheelock? [278]

A. Did I have a copy? Is that the question?

Q. Yes, of the policy which you were contemplating issuing to them? A. I had——

Q. (Interrupting): Did you have Builder's Risk Form No. 50, as amended?

A. I had the form, yes.

Q. Had it been filled out at that time?

A. It was merely a specimen. It wasn't a policy.

Q. But it was the same form as the Builder's Risk Form No. 50 that was ultimately issued?

A. That is correct.

Q. Wasn't it? A. Yes, sir.

Q. And they asked you as to the coverage, and particularly, among other things, as to the engine which they were going to bring from the Washington Iron Works, didn't they? A. Yes.

Q. And that engine was to be shipped from

(Testimony of Kenneth H. Wheelock.)

Seattle to Tacoma when completed, or when the boat was ready for it?

A. Yes, that is correct.

Q. Did they ask you to the coverage afforded by the policy pertaining to the engine?

A. Yes.

Q. What did you tell them? Did you tell them whether it would be covered or not?

A. If I may be permitted, the engine was not to be ready—or the boat was not to be ready for the engine for approximately three months. The contract called for the construction of the hull, together with the engine, \$15,000 [279] being the cost of the hull, and \$15,000 on the engine. In order to have the insureds money, the policy originally was written for \$15,000, which was the cost of the hull; and then the engine in the amount of \$15,000 was to be added at the time it was to be shipped from the Washington Iron Works to Tacoma, and it was during that period that questions arose as to the coverage. I remember one clearly because, while Mr. Hanney was in the office, I 'phoned the Franklin Fire and asked if the engine should be dropped while being unloaded at the boatbuilding company, would the policy cover; and it was during that period that I read the insuring agreements which have been referred to during this trial.

Q. I am asking you, Mr. Wheelock, whether you had any conversation in August with Mr. Hanney and Mr. Mikelsen relative to the coverage of this

(Testimony of Kenneth H. Wheelock.)

policy on the engine which they were going to purchase from the Washington Iron Works?

A. Yes, sir.

Q. Did you read to them certain clauses of the policy? A. I did.

Q. Will you kindly take Plaintiffs' Exhibit 1 and read to the jury the clauses that you read to them? What is the first clause that you read to them?

A. (Reading): "This insurance is also to cover all risks, including fire, while under construction and/or fitting out, including materials in buildings, workshops, yards and docks of the assured, or on quays, pontoons, rafts and so forth, and all risks while in transit to and from the works and/or the vessel wherever she may be lying, [280] also all risks of loss or damage through collapse of supports or ways from any cause whatever, and all risks of launching and breakage of the ways."

That is one clause.

Q. Now, what is the next clause that you read to them in this discussion?

A. The clause pertaining to trial trips, which was later eliminated by endorsement, but the clause reads: (Reading) "This insurance is also to cover all risks of trial trips, loaded or otherwise, as often as required, and all risks while proceeding to and returning from the trial course, but warranted that all trips shall be carried out within a distance by water of 100 nautical miles of place

(Testimony of Kenneth H. Wheelock.)

of construction, or held covered at a rate to be arranged.”

Q. Was there any other clause that you read to them at that time?

A. I think that that was all. The first clause is the actual insuring agreement.

Q. The first clause that you just read a few moments ago? A. Yes, sir.

Q. I will ask you, Mr. Wheelock, whether or not you read——

Mr. Maloy: May I approach the witness?

The Court: Yes, you may.

Q. (Mr. Maloy, continuing): Whether you read this clause that you—this clause that you first read here, it is right under the heading of Clauses for Builder’s Risk, isn’t it? A. Yes.

Q. It is the first clause? A. Yes. [281]

Q. And that is about halfway down the policy, isn’t it?

A. Well, it is the first clause under the Clauses for Builder’s Risk on the form, you mean?

Q. Yes.

A. It is about halfway down the form.

Q. Yes. Now, you didn’t read anything on this policy to them above this clause which you first read here, which is directly under Clauses for Builder’s Risk?

A. I don’t recall that I did, because this is the pertinent answer to the question of coverage.

Q. The rest of it is all in the policy, isn’t it?

A. Oh, yes.

(Testimony of Kenneth H. Wheelock.)

Q. Well, did you read this clause to them above, "On hull, tackle, apparel, ordnance, munitions, artillery, engines, boilers, machinery, appurtenances and so forth, including plans, patterns, molds and so forth, boats and other furniture and fixtures, and all material belonging and destined for Halibut Boat Hull No. 20, building at Brown's Point, Tacoma, Washington, as per clauses hereinbelow specified"? Did you read that to them?

A. Well, I couldn't have read "Halibut Boat Hull No. 20, Brown's Point" because——

Q. (Interrupting): Well, I mean the rest of it.

A. I think probably that I did. It would be unusual——

Q. (Interrupting): It would be natural for you to do so, wouldn't it?

A. It would be the natural thing.

Q. So you think you did read that clause to them also?

A. It would be the natural thing, yes, in trying to explain the coverage afforded under the policy.

[282]

Q. And you read that to them, and at the time you were then discussing the coverage which would be afforded to them under the policy?

A. That is correct.

Q. Now, you also told them that this engine was covered by the insurance as soon as it was shipped from the Washington Iron Works, didn't you, while in transit? A. Yes.

(Testimony of Kenneth H. Wheelock.)

Q. This policy wasn't delivered on August 20, 1941 to Mr. Hanney or anybody else, was it?

A. It wasn't written at that time.

Q. When was it written up?

A. Well, Mr. Moore, of the Franklin Fire, and myself, went to Tacoma——

Q. (Interrupting): Well, I think that is immaterial.

A. (Continuing): ——on the 19th——

Q. (Interrupting): Just answer the question, please.

A. I can't tell you when it was written up, sir. The order was placed on the night of the 19th. That is, the order to the insurance company to issue the policy. The keel was to be laid on the morning of August 20th. Now, in the normal course——

Q. (Interrupting): Well, never mind. Just answer the question.

A. Well, I cannot tell you when the policy was received by me.

Q. Can you tell us when you delivered the policy to Mr. Hanney?

A. Not without referring to my correspondence, which you have, or the court has. I wrote a letter to Mr. Hanney. As I recall, my only address of his was in Seattle, and I [283] believe that he was in Alaska at the time I received the policy.

Q. Then you wrote to him, I believe, to ask him the correct address to which to mail the policy, isn't that right?

(Testimony of Kenneth H. Wheelock.)

A. Yes, I think that is correct.

Q. Then, to refresh your recollection, isn't it true that about September 30 or thereabouts you finally mailed the policy to him?

A. I couldn't say without referring to the correspondence.

Q. Well, it was sometime later, wasn't it?

A. It was later.

Q. During this period of time, you knew that Mr. Mikelsen and Mr. Vohl were interested with Mr. Hanney?

A. I don't think that I had ever met Mr. Vohl at that time.

Q. Well, you knew that he had others interested with him?

A. At some time he told me that he did have two other gentlemen who were financially interested in this.

Q. And didn't he tell you—didn't Mr. Hanney tell you, or didn't Mr. Mikelsen, in this meeting, that they were going to acquire some fishing gear and some equipment for this vessel, and were in the process of doing so?

A. No, I have no recollection of anything pertaining to nets and things of that nature. The policy was issued upon the basis of the contract of \$30,000; and anything going into the hull, in the amount of that \$30,000 in that agreement, I explained to them would be covered in accordance with the insuring clauses which I originally read.

Q. And in accordance with the clause which you

(Testimony of Kenneth H. Wheelock.)

said just a moment ago that you undoubtedly read, where it says, "On [284] hull, tackle, apparel" and so forth? A. That is correct.

Q. Now, of course, when the keel was laid, the keel wasn't worth \$15,000, was it? A. No.

Q. But they had \$15,000 of insurance?

A. That is correct.

Q. In other words, the hull—that is, the wooden hull itself wasn't worth \$15,000 until it was completed by the shipyard, isn't that correct?

A. That is correct.

Q. So there was a period of time that elapsed between the time the policy was issued and the time of the completion of the hull when, if only the hull was insured, there was considerable over-insurance, wasn't there?

A. Not necessarily.

Q. Why not?

A. A Builder's Risk policy is designed just for the purpose which you have stated, and the rates are predicated upon the fact that, when the keel is laid, there is not much value.

Mr. Maloy: I move to strike that. I don't care anything about the rates.

Mr. Stafford: Let him answer.

Mr. Maloy: Well, I know, but he can answer the question.

Mr. Stafford: He is answering it. You said, "Why not?" He is answering your question.

The Court: Wait just a moment. Let me hear one at a time. [285]

(Testimony of Kenneth H. Wheelock.)

Mr. Maloy: I am objecting to making a stump speech on the witness stand and running into a lot of stuff about rates. I asked him if it wasn't a fact that, between the time the keel was laid and the hull was insured, if the insurance only covered the hull, there was considerable over-insurance because their insurance was \$15,000.

The Court: And his answer was——

Mr. Stafford: (Interrupting) That is not the question, if your Honor please.

Mr. Maloy: That is the question I want to ask him. I want it answered directly.

Mr. Stafford: If your Honor please, I insist that he be permitted to answer the question that was put.

The Court: If you will wait, I will have it read, and then I will determine it.

Mr. Maloy: I can withdraw the question if I want to. I will withdraw the question and put this question I just propounded.

The Court: You have that privilege.

Mr. Maloy: Now, read the question that I just last propounded.

(Mr. Maloy's statement, "I asked him if it wasn't a fact that, between the time the keel was laid and the hull was insured, if the insurance only covered the hull, there was considerable over-insurance because their insurance was \$15,000" was read by the reporter.)

(Testimony of Kenneth H. Wheelock.)

Q. (Mr. Maloy): That is the question I desire answered.

A. My answer, then, is "No."

Q. Well, the keel and the partially constructed vessel wasn't [286] worth \$15,000, was it?

A. No, sir.

Q. And, of course, I take it and assume, Mr. Wheelock, that you never had any discussion with any of these gentlemen at any time or at all, or with any of them, concerning this policy of insurance covering any fishing gear or equipment or materials while stored in Seattle?

A. To the best of my knowledge, no.

Mr. Maloy: I think that is all. I have Mr. Wheelock's deposition here, but I haven't had a chance to look it over, and I would like to have a chance to look it over. There might be another question or two, but I doubt it.

The Court: Do you wish to redirect as to any matter?

Mr. Stafford: I have no redirect.

The Court: You may be excused from the stand, but would you kindly remain in attendance until excused?

Mr. Maloy: I will do this, your Honor. I am acquainted with Mr. Wheelock, and I will notify Mr. Stafford at nine o'clock tomorrow morning whether he will need to appear here for any further cross examination, so he can be excused unless counsel desires him further.

Mr. Stafford: I would appreciate that, and I am sure Mr. Wheelock would.

(Testimony of Kenneth H. Wheelock.)

Mr. Maloy: I will be glad to do that, to accommodate Mr. Wheelock.

The Court: Counsel for the Plaintiffs has agreed to notify Mr. Stafford by nine o'clock tomorrow morning whether or not your further attendance is desired. Unless [287] your further attendance after today is requested, you will be excused without coming tomorrow. You won't have to come tomorrow unless counsel for the Plaintiffs advises Mr. Stafford that he wishes you here.

(Witness excused.) [288]

The Court: Any rebuttal?

Mr. Maloy: Just a bit. I would like to call Mr. Mikelsen.

The Court: Mr. Mikelsen, come forward. You have already been sworn. You may resume the stand.

HANS MIKELSEN

one of the Plaintiffs, called as a witness in rebuttal, being previously sworn, testified as follows:

Direct Examination

By Mr. Maloy:

Q. Mr. Mikelsen, did you see the young lady that took the witness stand yesterday, Mrs. Paulsen, when she was on the stand? A. Yes.

Q. State whether you have ever seen her before?

A. Yes, that is the girl that were in the office.

(Testimony of Hans Mikelsen.)

Q. What is that?

A. That is the girl that were in the office of Mr. Wheelock.

Q. And when was that?

A. In August, 1941 when I were up there.

Q. Did you see her any other time?

A. I didn't see her any other time.

Mr. Maloy: That is all.

Mr. Stafford: I have no questions.

The Court: You may be excused from the stand.

(Witness excused.)

Mr. Maloy: I will ask Mr. Hanney to take the stand. [300]

The Court: Mr. Hanney, you have already been sworn. You may now resume the stand.

OLUF B. HANNEY

one of the Plaintiffs, called as a witness in rebuttal, being previously duly sworn, testified further as follows:

Direct Examination

By Mr. Maloy:

Q. Mr. Hanney, you heard Mr. Landon's testimony yesterday about his having drafted this contract, the boatbuilding contract for you?

A. Yes.

Q. Did you? A. Yes.

Q. What is the fact? Did he draw it for you or didn't he?

(Testimony of Oluf B. Hanney.)

A. Well, he drew it for us. The reason why——

Mr. Stafford: (Interrupting) Would you speak up, please, Mr. Hanney?

The Court: We will have the reporter read the answer made.

(Whereupon, the incompleated answer of the witness was read by the reporter.)

Q. (Mr. Maloy) Go ahead and finish your answer.

A. The reason why was because usually these small yards, they draw their own contract, and we sign them right there; and this time Mr. Landon drew it for us.

The Court: May I ask what you meant by "we signed it right there"?

The Witness: We signed it at Mr. Peterson's [301] office in Tacoma.

The Court: At the boatbuilding plant?

The Witness: At the boatbuilding plant. Why I didn't remember that is because we have several contracts before, and the yards used to draw their own contracts, them small yards.

Q. (By Mr. Maloy) Did you have another contract in existence where you were having another boat built at the same time? A. No.

Q. You didn't have any other boat that was being built? A. Not at the same time.

Q. Not at the same time? I see.

The Court: Did you understand his answer?

Mr. Maloy: Yes, I did.

(Testimony of Oluf B. Hanney.)

The Court: The rest of his answer?

Mr. Maloy: Yes. That is all.

Cross Examination

By Mr. Stafford:

Q. Now, Mr. Hanney, how many boats have you had built by contractors who provided their own contracts? A. Oh, about four boats.

Q. In the period of how many years?

A. Oh, 14 or 15 years.

Q. And were all of these boats as large as this one? A. Except one.

Mr. Stafford: I have no further questions.

Mr. Maloy: That is all.

The Court: You may be excused.

(Witness excused.) [302]

[Endorsed]: Filed Jan. 13, 1945.

[Endorsed]: No. 10938. United States Circuit Court of Appeals for the Ninth Circuit. The Franklin Fire Insurance Co. of Philadelphia, Pennsylvania, a Corporation, Appellant, vs. Oluf B. Hanney, Hans Mikelsen and Paul Vohl, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States States for the Western District of Washington, Northern Division.

Filed Jan. 30, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,938

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA, a
corporation,

Appellant

STIPULATION

It Is Hereby Stipulated by and between appellant and appellees, through their respective counsel, that subject to the approval of the Circuit Court of Appeals the appellant may have up to and inclusive of March 1, 1945, in which to serve and file its opening brief on appeal.

It Is Further Stipulated by and between appellant and appellees, through their respective counsel, that pursuant to the order of the Honorable John Bowen, District Judge, dated November 25, 1944, which order was subsequently confirmed by the Circuit Court of Appeals, directing the appellant to furnish the following portion of the reporter's transcript of record and exhibits:

1. All of the evidence included in the reporter's transcript of the evidence of the following plaintiffs' witnesses, to-wit: Hans Mikelsen, Oluf B. Hanney, H. T. Duren, Paul Vohl, Ben Smith, and

Henry Stakset, including the plaintiffs' Exhibits numbered (1) the insurance policy, (2) the inventory of personal property, (4) letter, Hansen & Rowland, Inc. to Franklin Fire Insurance Co., and (5) letter of Franklin Fire Insurance Co. to Hansen & Rowland, Inc., offered and received in evidence during trial of said cause.

2. All of the evidence in the reporter's transcript of defendant's witness, Kenneth Wheelock, offered and received in evidence during the trial of the said cause.

that the appellant will immediately direct the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to cause to have printed, or print, the above designated and described portion of the reporter's transcript of the evidence and the exhibits above mentioned so that they will be and constitute a supplemental transcript of the record on appeal of the above entitled cause.

Dated this 30th day of January, 1945.

HAYDEN, MERRITT, SUM-
MERS & STAFFORD

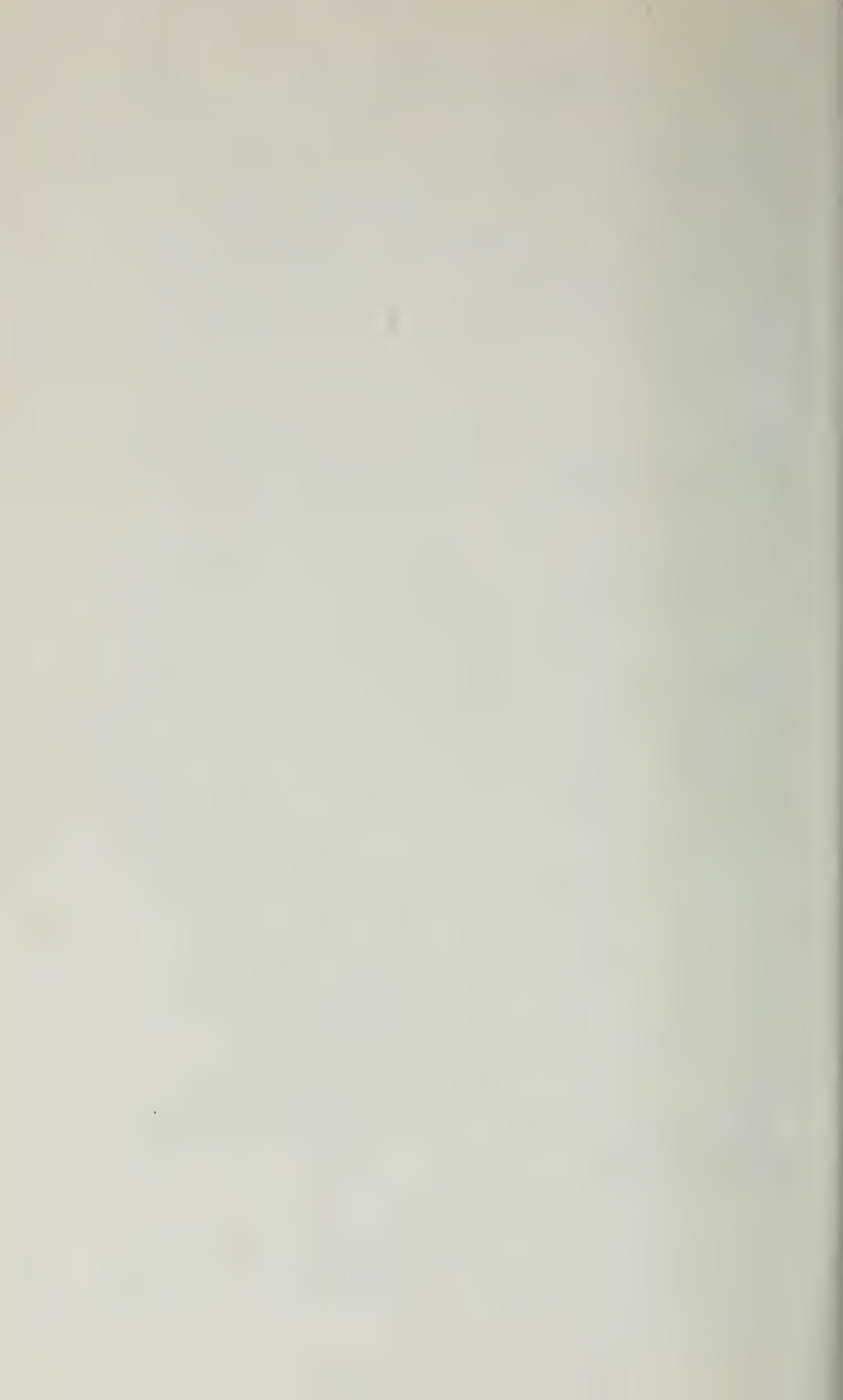
By MATTHEW STAFFORD

Attorneys for Appellant

C. E. H. MALOY

Attorneys for Appellees

[Endorsed]: Filed Feb. 2, 1945. Paul P.
O'Brien, Clerk.



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE Co. OF
PHILADELPHIA, PENNSYLVANIA, a corpo-
ration, *Appellant,*

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

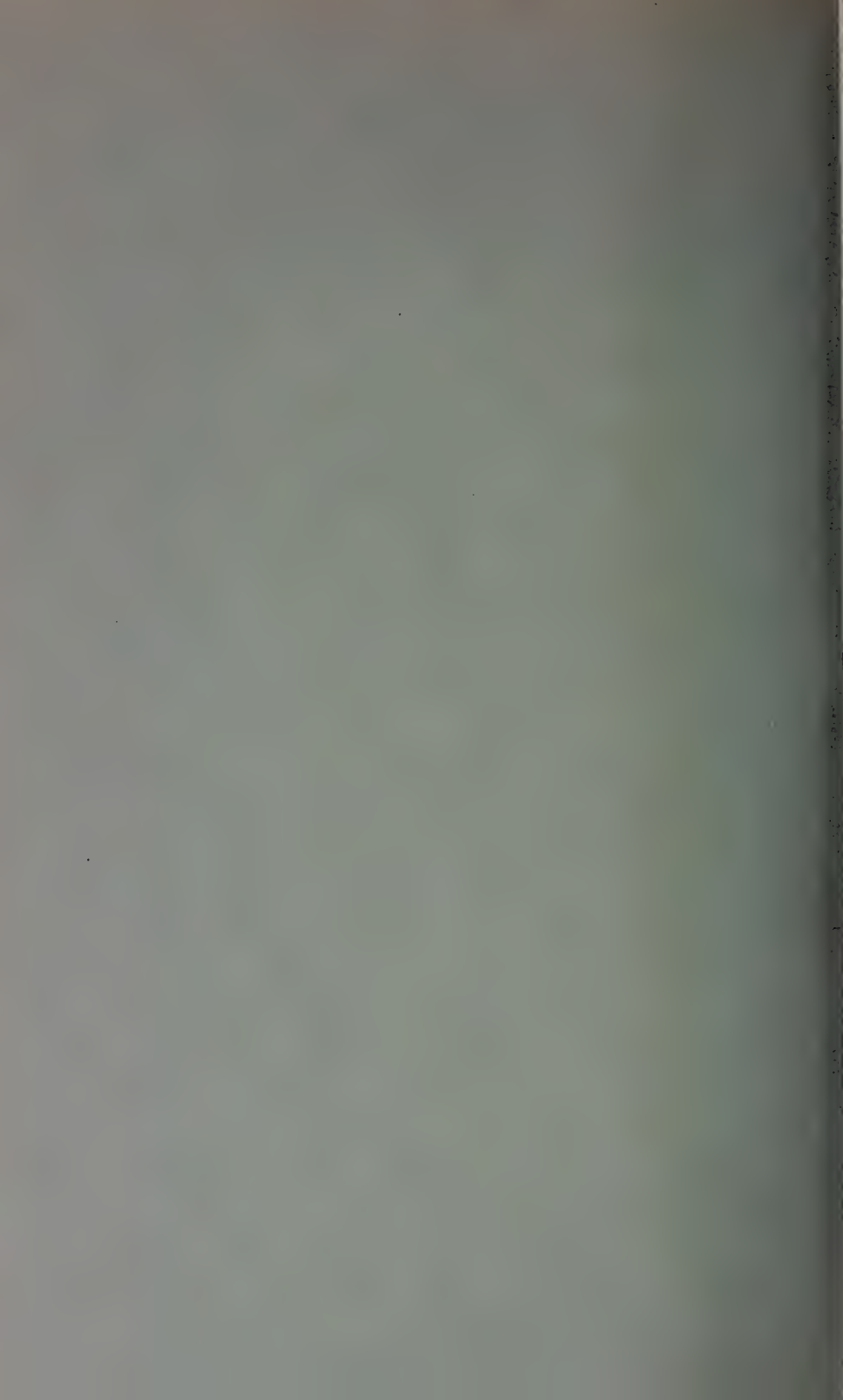
BRIEF OF APPELLANT

LANE SUMMERS,
MATTHEW STAFFORD,
Attorneys for Appellant.

HAYDEN, MERRITT, SUMMERS & STAFFORD,
Central Building,
Seattle 4, Washington.

FILED

MAR 1 - 1944



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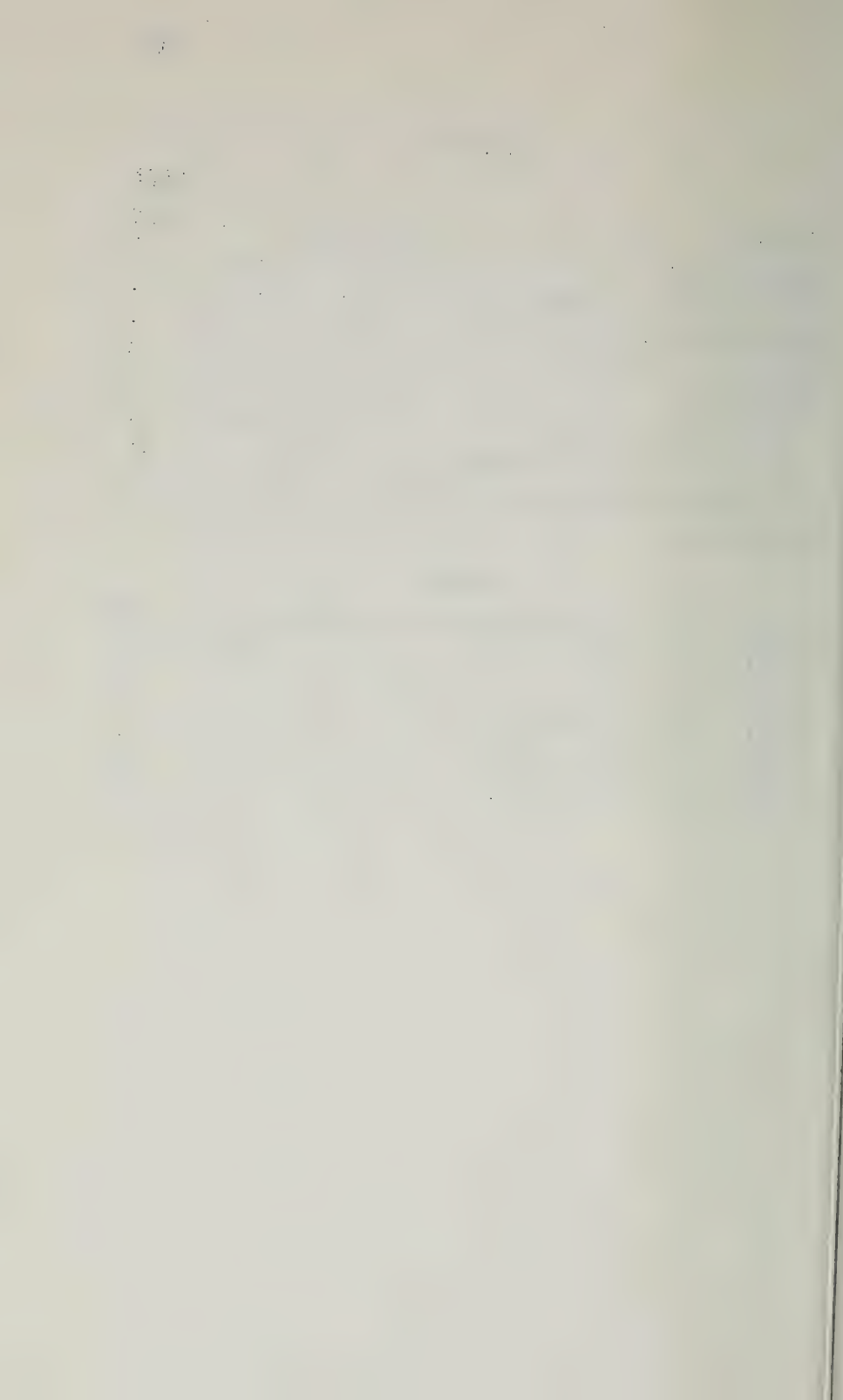
HAYDEN, MERRITT, SUMMERS & STAFFORD,
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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA, a corpo-
ration,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

No. 10938

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction of the trial court in this cause is based upon U.S.C. Title 28, sec. 41(1) conferring upon federal district courts original jurisdiction of all suits of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00 and is between citizens of different states. In this cause by the Amended Complaint the plaintiffs, citizens and residents of the State of Washington, sued the defendant, a citizen and resident of the State of Pennsylvania, to recover \$14,160.14, for all

of which the defendant denied liability by its Second Amended Answer (R. 2, 8, 39).

Jurisdiction of the appellate court in this cause is based upon U.S.C. Title 28, sec. 225, authorizing an appeal to a United States Circuit Court of Appeals from final decision in a federal district court, and upon U.S.C. Title 28, sec. 230, requiring such an appeal to be taken within three months after entry of judgment. In this cause the order of the trial court (R. 41, 42) denying the defendant's Motion for Summary Judgment, became a final decision when judgment against the defendant was entered on November 10, 1944 (R. 121). Notice of appeal and supersedeas bond were duly filed on November 16, 1944 (R. 122-124; F.R.C.P. Rule 73).

STATEMENT OF THE CASE

This cause has developed two appeals—the present by the defendant; and a former by the plaintiffs, identified in this court as No. 10647.

The plaintiffs' Amended Complaint contained two counts.

The first count asserted a claim for recovery for personal property lost by fire while in storage at Seattle against the defendant upon its Builders' Risk Policy of insurance covering the construction of a vessel at Tacoma (R. 2). The second count asserted a claim for recovery for the same loss upon the same policy—not as written and issued—but as to be reformed to cover personal property at Seattle (R. 6).

As to the first count of the Amended Complaint based upon the policy, the defendant's Motion to Dismiss for failure to state a claim was granted by the lower court (No. 10647; R. 32-35); and the plaintiffs took the former appeal (No. 10647; R. 35).

As to the second count of the Amended Complaint based upon reformation, incidental to the former appeal it was eliminated from the case by plaintiffs' election and waiver upon which the lower court entered a consent order of dismissal (R. 25, 26).

Concluding the former appeal and reversing the lower court's dismissal of the first count, this court rendered an opinion ruling that the language of the Builders' Risk Policy (standing alone) left the scope of its coverage over plaintiffs' property lost at Seattle "in considerable obscurity." However, this court also said: "We have no settled view concerning the extent

of the coverage afforded by this policy, and we desire not to be understood as expressing any" (Opinion No. 10647 filed May 24, 1944; reported 142 F.(2d) 864).

After remand to the lower court the "further proceedings" included the following:

(1) The defendant took the deposition of Stakset solely as to the amount of plaintiffs' loss or damages (R. 43-89);

(2) The *plaintiffs* took the deposition of Wheelock, a Seattle insurance agent, as to the coverage of the defendant's Builders' Risk Policy obtained through him (R. 89-119);

(3) The defendant filed its "Request for Admissions under Rule 36," incorporating therein "*Agreement*" (dated May 14, 1941, between Hanney, one of the plaintiffs, and Petersen, a builder) *for the construction of the vessel to be "known and designated as Hull No. 20,"* which was insured by the Builders' Risk Policy in suit (R. 26-35);

(4) The plaintiffs filed their "Response to Request for Admissions under Rule 36" (R. 35-37);

(5) The defendant filed its "Second Amended Answer to Plaintiffs' Amended Complaint"—with plaintiffs' written permission (R. 38, 39);

(6) The defendant filed its "Motion for Summary Judgment under Rule 56" (R. 39, 40);

(7) With plaintiffs' consent (R. 41) and *before* the trial (R. 42), the defendant's Motion for Summary Judgment was presented upon the record as then existing (R. 41). After argument the motion

was denied by oral ruling and formal order on October 31, 1944 (R. 41, 42);

(8) A jury trial followed, which was concluded by a verdict for plaintiffs in the sum of \$7,200.00, upon which a judgment was entered against the defendant, with allowance of costs and interest at six per cent from the date of the loss on February 24, 1942, until the date of final payment (R. 120, 121);

(9) The defendant promptly instituted the present appeal (R. 122-124).

STATEMENT OF POINTS

With its Notice of Appeal and Supersedeas Bond the defendant on November 16, 1944, filed "Statement of Points on which Appellant Intends to Rely on Appeal" (R. 125), specifying the following:

(1) That the District Court erred by failure and refusal to grant before and without trial the defendant's motion for summary judgment under Rule 56, argued and submitted on October 31, 1944;

(2) That the District Court erred by entering order denying the defendant's motion for summary judgment under Rule 56 on October 31, 1944;

(3) That the District Court erred by entering final judgment on November 10, 1944, in favor of the plaintiffs and against the defendant, because the latter continued entitled to summary judgment in its favor without trial upon its said motion under Rule 56 as of October 31, 1944;

(4) That the District Court erred in the final judgment entered on November 10, 1944, by al-

lowing interest upon the plaintiffs' unliquidated demand from February 24, 1942, the date of the loss, rather than from November 10, 1944, the date of said judgment.

After the present appeal was docketed in this court the defendant adopted and reiterated, without change or addition, the above "Statement of Points" as filed in the lower court (R. 130). The defendant has never assigned error or taken appeal from any trial proceeding or ruling.

QUESTIONS INVOLVED

A. The *major* problem for solution on the present appeal is whether the defendant's motion for summary judgment of dismissal should have been granted before trial.

This major problem divides itself into two questions:

(1) Whether, considering "the pleadings, depositions and admissions on file" when the motion for summary judgment was determined, there was "no genuine issue as to any material fact," except only "as to the amount of damages"—a procedural question of law arising from the language of F.R.C.P. Rule 56;

(2) Whether the Builders' Risk Policy in suit clearly negatived insurance covering plaintiffs' loss in Seattle when the policy was explained and its subject matter identified of record by the agreement for the construction of "Hull No. 20" at Tacoma—a substantive question of law arising from the merits of the litigation.

B. The *minor* problem for decision on the present

appeal (to be examined only if the lower court be otherwise affirmed) is whether the judgment below should have allowed interest from the date of the loss when the amount thereof was unliquidated and disputed.

C. From the defendant's point of view the present appeal involves no question of fact.

ARGUMENT

1. No Factual Issue.

It is the defendant's contention (when its motion for summary judgment was submitted) "that, except as to the amount of damages, there was no genuine issue as to any material fact" appearing of record as it then existed in this case.

Rule 56 of the Federal Rules of Civil Procedure, so far as material, provides:

Rule 56(b) "A party against whom a claim * * * is asserted * * * may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

Rule 56(c) "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The motion for summary judgment read as follows:

"Comes now the defendant and moves for summary judgment dismissing the above entitled action with prejudice and with costs and dis-

bursements to be taxed in favor of the defendant and against the plaintiffs upon the ground that there is no genuine issue as to any material fact (except as to the amount of damages) and that the defendant is entitled to such judgment as a matter of law.

"This motion is based upon the record herein including the first cause of action in the plaintiffs' amended complaint, the second amended answer of the defendant, the depositions, the defendant's 'Request for Admissions under Rule 36' and the plaintiffs' 'Statement in Response to Request for Admissions under Rule 36'." (R. 39, 40)

As recited by the motion, it was technically based on the record then existing, which comprised:

- (a) The first count of plaintiffs' amended complaint, (R. 2-6);
- (b) The defendant's request for admissions under Rule 36, (R. 26-35);
- (c) The plaintiffs' responsive admissions under Rule 36, (R. 35-37);
- (d) The defendant's second amended answer, (R. 38, 39);
- (e) The two depositions, (R. 43-119).

The first count of the plaintiffs' amended complaint (R. 2-6) in substance alleged:

In Article I that the plaintiffs and the defendant were citizens of different states, and that the amount in controversy exceeded \$3000;

In Article II that on August 20, 1941, the plaintiffs were the owners of a boat then being built at Brown's Point, Tacoma, called "*Hull No. 20*"; that the plaintiffs "desiring to effect insurance" on "*Hull No. 20*" and upon all mate-

rials, etc., acquired and accumulated for her construction and upon all apparel, etc., belonging to and destined for said "Hull No. 20," the defendant for a certain premium on August 20, 1941, at Seattle issued a policy of insurance, copy being attached as Exhibit A (R. 10-22) ;

In Article III that the term of the policy was extended in time beyond February 24, 1942, when it continued effective ;

In Article IV that during the period from September, 1941, into February, 1942, the plaintiffs were the owners of certain articles of property stored in a locker at Seattle for the express purpose of being attached to and used in the outfitting and operation of said "Hull No. 20" ; that on February 24, 1942, all of said articles so stored in Seattle were lost by fire, list thereof being attached as Exhibit B (R. 23-25) ;

In Article V that plaintiffs' loss amounted to \$14,160.14, which the defendant had refused to pay.

By the defendant's "Request for Admissions under Rule 36" and the plaintiffs' "Response" thereto (R. 26-37) it was established and admitted of record :

(1) That the document attached to and exhibited with the defendant's request was "a true copy of the original agreement" dated May 14, 1941, between Hanney, one of the plaintiffs, and Petersen, a builder (dba Marine View Boat Building Co.), providing for the construction in the latter's yard at Brown's Point, Tacoma, of a vessel known as "*Hull No. 20*" upon certain specifications, calling for a purchase price of \$30,000, and stipulating for the protection of builders' risk insurance (R. 30-35) ;

(2) That said agreement dated May 14, 1941,

between Hanney, one of the plaintiffs, and Petersen, the builder, was the agreement under which was constructed "*Hull No. 20*," so designated both in said agreement itself and in the Builders' Risk Policy, identified in plaintiffs' amended complaint as Exhibit A, (R. 21, 22, 26, 29, 32);

(3) That full performance of said agreement (either by Hanney or by Petersen) did not require any of the property, lost by fire and described by plaintiffs' amended complaint in list identified as Exhibit B, to be acquired for or to be used in the construction of the vessel known as "*Hull No. 20*," (R. 27, 29, 36, 37);

(4) That in the performance of said agreement and in the construction thereunder of the vessel known as "*Hull No. 20*" there was not used any property of the kind and description as listed, (R. 27, 28, 36).

The defendant's Second Amended Answer (R. 38, 39) to plaintiffs' Amended Complaint tacitly admitted all allegations of its first count excepting for denials made in the following language:

(1) "The defendant denies that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy;

(2) "The defendant (in harmony with admissions made and filed in behalf of the plaintiffs herein) denies that the property listed and described by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20;

(3) "The defendant denies that the property listed and described by Exhibit B was at the time lost by fire of the value of \$14,160.14;

(4) "The defendant denies that there is due or owing to the plaintiffs from the defendant the sum of \$14,160.14 or any lesser sum." (R. 38, 39).

As already observed, the defendant's motion for summary judgment technically was based upon the record as existing in the District Court, which included two depositions—one by the witness Wheelock (R. 89-119) and one by the witness Stakset (R. 43-89). As to these, the deposition of Wheelock, a Seattle insurance agent, taken by the plaintiffs, was wholly favorable to the defendant concerning the coverage of the defendant's Builders' Risk Policy obtained through him; and the deposition of Stakset, taken by the defendant, was entirely confined to values—the amount of plaintiffs' loss or damages. However, although published before trial (R. 41) to permit examination, these depositions were not actually urged by the defendant in support of its motion in the lower court; and these depositions are not now stressed in support of the motion before this Court.

Furthermore, no affidavits (as allowed by Rule 56) were ever filed by the defendant or by the plaintiffs, either to win or to defeat the motion for summary judgment.

Hence, it appears that the defendant asks this Court to analyze the allegations of the first count of the plaintiffs' amended complaint, the admissions made by the plaintiffs in response to request therefor

under Rule 36, and the denials of the defendant's second amended answer; and then to join in the conclusion that when the motion for summary judgment under Rule 56 was submitted, "except as to the amount of damages, there (was) is no genuine issue as to any material fact"—in other words, that the record then presented only a question of law as to liability for decision by the court.

When the motion for summary judgment was interposed and decided there *could* have been "no genuine issue as to any material fact" except as raised by a denial of the defendant in its second amended answer to an allegation of the plaintiffs in the first count of their amended complaint.

What were the defendant's denials?

First, the defendant denied "that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy" (R. 38).

That was not a denial of an allegation of a material fact. That was the negation of a proposition of law. And the denial in an answer of a conclusion of law improperly pleaded in a complaint raises "no genuine issue as to any material fact."

"Conclusions of law do not call for a denial, and are not binding as admissions when not denied. A denial of a conclusion of law raises no issue * * *."

1 Bancroft's Code Pleading, Sec. 401, p. 591.

Second, the defendant denied "(in harmony with admissions made and filed in behalf of the plaintiffs herein) * * * that the property listed and described

by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20" (R. 38).

That denial raises "no genuine issue" because the factual allegations so denied by the defendant had been withdrawn, neutralized or superseded by the plaintiffs themselves in their admissions (R. 26-39) under Rule 36, by which they were bound and upon which the denial was based.

Third, the defendant denied "that the property listed and described by Exhibit B was at the time lost by fire of the value of \$14,160.14" (R. 38, 39).

That denial was directed and limited solely "to the amount of damages." It was unrelated to the question of liability. That denial, while raising a genuine issue of material fact, was expressly excepted by Rule 56, which permitted the same and authorized a summary judgment notwithstanding.

Fourth, the defendant denied that there was "due or owing to the plaintiffs from the defendant the sum of \$14,160.14 or any lesser sum" (R. 39).

That denial raises "no genuine issue as to any material fact" within the meaning of Rule 56, because primarily it was a denial of a conclusion of law, and because secondarily it was related to the "amount of damages."

Other than these several denials by the defendant there was none of record when the motion for sum-

mary judgment was submitted. Hence, there being "no genuine issue as to any material fact" other than "as to the amount of damages" the lower court was obligated to rule upon the question of law presented, and either to grant summary judgment of dismissal, or (if dismissal were denied) to restrict the trial to the question of the amount of damages.

2. No Insurance Coverage.

As to the principal question of substantive law arising from the merits of this case, it is the contention of the defendant that, when read in the light of the agreement of May 14, 1941, between Hanney, one of the plaintiffs, and Petersen, the boat builder, the defendant's Builders' Risk Policy plainly covered only the vessel known as "*Hull No. 20*" during construction together with the materials, etc. destined for and used in such construction at Tacoma, as contemplated by said agreement.

This is not the same contention urged by the defendant before this Court upon the former appeal taken by the plaintiffs in this case. Then the defendant argued to support the earlier ruling of the District Court that the policy within itself clearly showed its coverage was not extended to materials of plaintiffs in storage at Seattle.

Because this Court's earlier opinion (142 F.(2d) 864) has indicated that the policy alone left the scope of its coverage in "obscurity" and has invited clarification by interpretation flowing from the parties involved, the policy is returned on this appeal in company with the construction contract between such

parties in which and by whom the insurance was required as an important incident to the building of the vessel "designated as Hull No. 20."

This agreement (R. 30-35) dated May 14, 1941, was signed by Petersen, of Brown's Point, Tacoma, d.b.a. Marine View Boat Building Co., as *first party*, and Hanney, of Ketchikan, one of the plaintiffs, as *second party*, reciting that Hanney was desirous of having built for him a fishing vessel and that Petersen was engaged in the business of building such craft.

Aside from mere details and insignificant elements, the agreement provided:

That the first party was to build a certain type of fishing boat "in accordance with plans and specifications to be drawn by first party" of customary construction for such type (similar to a certain completed vessel called the "Nordic Pride") the dimensions and characteristics being itemized.

That the "*vessel shall be complete in all respects*" and shall be equipped with certain described engine, propeller, whistle, compressor, air tanks, propeller shaft, "other standard equipment, spare engine parts and tools."

That "THE VESSEL HEREIN CONTEMPLATED SHALL BE KNOWN AND DESIGNATED AS HULL NO. 20 DURING ITS CONSTRUCTION."

That keel for the vessel shall be laid immediately after a certain other vessel shall have been launched.

That "the finished boat shall be delivered to second party at Astoria, Oregon, immediately

after completion * * * said trip to Astoria, Oregon, to constitute said vessel's trial trip."

That "the *first party* shall not be held liable to second party for * * * delay in delivery of materials or for accidents to said vessel during the course of construction."

That the "*first party* shall procure * * * in favor of second party * * * a bond issued by a reliable surety company in the sum of thirty thousand dollars (\$30,000) * * * to be conditioned that first party will perform and fulfill the terms and conditions of this contract."

That the "FIRST PARTY SHALL PROCURE BUILDERS' RISK INSURANCE."

That the second party shall pay to the first party "for said vessel, complete with equipment and engine, the sum of thirty thousand dollars (\$30,000.00)" by installments, the last "after trial trip to Astoria, Oregon, and acceptance of vessel by second party at Astoria, Oregon."

That the "second party shall have the right and privilege of *selecting* the winches, toilet, sinks" and certain other listed items of equipment or fittings with a resulting limited variation, up or down, from the total contract price of \$30,000.00.

As provided by this agreement signed on May 14, 1941, calling for the building of the vessel to be "known and designated as Hull No. 20 during construction," inferentially its keel was laid and work was begun as soon as the other vessel, mentioned therein, was off the ways and was launched. Also inferentially this was about August 20, 1941, when the Builders' Risk Policy was issued.

Of course this policy was analyzed and discussed

in behalf of the defendant by the "Brief of Appellee" upon the earlier appeal in this case (No. 10647). However, it was then inappropriate to mention its relation to the construction contract or to draw any interpretive aid therefrom.

Examination of this policy, being Exhibit A, (R. 10-22) shows as follows:

(1) That the policy named the assureds as "Peter Petersen d/b/a Marine View Boat Building Co., builder ,and Oluf B. Hanney, owner" (R. 17, 21, 22) ;

(2) That the policy identified and described the property insured

(a) on the outside cover (R. 21) as "Hull No. 20 (Being Built)";

(b) by the basic policy form (R. 18) as "Hull No. 20 (Being Built)";

(c) in the Builders' Risk Form of endorsement (R. 22) as "Hull No. 20, building at Brown's Point, Tacoma, Washington."

Hence, by examination of both the agreement of May 14, 1941, and the Builders' Risk Policy it appears that the parties to the construction contract were the assureds in the insurance contract, that the construction contract required the procurement of the insurance contract, that the insurance contract was issued in performance of the construction contract, and that both contracts were elements or parts of a single transaction. Again, by examination of both such instruments it appears the subject matter of both was identified and described by the same designation—"Hull No. 20"—a fairly arbitrary term doubtlessly chosen by Petersen, the builder, for convenience to

distinguish the proposed vessel from other like craft in more or less current construction by him; and also a term certainly employed in the Builders' Risk Policy only because it was supplied to the defendant by one of the assureds, either Petersen, the builder, or Hanney, one of the plaintiffs. Further, by such examination and by reference to the defendant's "Request for Admissions under Rule 36," in item "(2)-f" and the plaintiffs' "Response" thereto (R. 29, 36, 37) it appears that "Hull No. 20" in the agreement dated May 14, 1941, and "Hull No. 20" in the Builders' Risk Policy were identical. Finally, by such examination of the two interdependent documents and by reference to the several admissions of plaintiffs (R. 35-37) in "Response" to the defendant's "Request for Admissions under Rule 36" (R. 26-35), it appears that the property designed for use in the construction of "Hull No. 20" was the same as the property intended for protection by the insurance of "Hull No. 20."

But where does this conclusion lead? Directly, to the necessarily resulting conclusion that plaintiffs' property lost by fire while in storage at Seattle was not insured by the Builders' Risk Policy because such property was no part of "Hull No. 20" within the provisions or contemplation of the agreement dated May 14, 1941.

As demonstrated, the term "Hull No. 20" used in the policy was derived and adopted from the builder's contract. The policy did not define the term. But the builder's contract did; it said, "*the vessel herein contemplated shall be known and designated as Hull No. 20 during its construction*" (R. 32). And the builder's

contract further defined the term "Hull No. 20" by providing in substance that Petersen, the builder, was to draw the plans and specifications; determine and acquire the materials; deliver and assemble them at his plant in Tacoma; perform the necessary labor and make all the requisite installations—to the end that the "vessel shall be complete in all respects" (R. 32) and "the finished boat shall be delivered to (Hanney, one of plaintiffs) at Astoria, Oregon" (R. 32).

Within the definition of "Hull No. 20" as employed in the agreement of May 14, 1941, Hanney was obligated to do nothing except to pay money for the premiums on the performance bond and insurance policy and for the purchase price of the proposed vessel title to which was to pass from Petersen, the builder, on delivery and acceptance at Astoria, Oregon. In other words, the term "Hull No. 20" did not contemplate materials which Hanney was obligated to own or to supply for the construction of the completed or finished vessel.

However, it is true that the agreement of May 14, 1941, did contain a clause giving to Hanney the mere option of "*selecting*" (R. 34) certain limited specified items of installation such as "winches, toilet, sinks," etc. But none of these items covered by this option of selection were articles of property owned by the plaintiffs and destroyed in storage at Seattle, as listed in Exhibit B (R. 23-25).

Aside from the definition of "Hull No. 20" as embodied in the agreement of May 14, 1941, it otherwise appears inferentially therefrom that the property stored in Seattle was never intended to be protected

by the Builders' Risk Policy—not even by the plaintiffs, until after the fire loss. This fact outcrops from the values involved in the builder's contract, the insurance policy and the plaintiffs' claim of recovery.

The agreement of May 14, 1941, fixed the full purchase price for "Hull No. 20," as a completed vessel with all materials, installations and labor furnished by Petersen, the builder, at the sum of \$30,000.00 (R. 33). This agreement required the builder's obligation on a performance bond in the sum of \$30,000.00 (R. 33).

The Builders' Risk Policy was originally issued as of August 20, 1941, for the sum of \$15,000 to run until November 20, 1941 (R. 18, 21, 22). On the expiration date it was extended until December 20, 1941, without increase in the amount of insurance (R. 16). On December 20, 1941, it was again extended until January 20, 1942, without increase in the amount of insurance (R. 15). Shortly thereafter, on December 23, 1941, an endorsement was added to the policy which recited that "the completed price of this hull and machinery is \$30,000 and this policy is written in the amount of \$15,000 valued at \$30,000" (R. 13, 14). Then on January 20, 1942, the policy was extended for another period of thirty days and an endorsement change was made reading "that the valuation of the hull for insurance purposes is changed to read \$15,000.00 with the amount of insurance carried \$15,000.00" (R. 12, 13). Ultimately, in February, 1942, (doubtless because of the arrival and installation of the vessel's engine and machinery) there was attached to the policy an endorsement

change which raised the actual amount of insurance protection to the level of the full purchase price of "Hull No. 20" as fixed by the construction contract; this endorsement agreed "that the amount of insurance under this policy is increased to \$30,000.00 valued at \$30,000.00 * * * and is extended to cover machinery" (R. 11, 12).

These modifications in the provisions and figures specified by the successive policy endorsements as affecting the amount of protection, disclose that the assureds were observing the progress as to the construction on "Hull No. 20," were attempting to measure their insurance by the values at risk under the building contract, and were wanting full coverage for the final purchase price of \$30,000.00 when "Hull No. 20" approached completion.

However, according to the plaintiffs' amended complaint from some day in September, 1941, until the 24th day of February, 1942, they at all times owned property stored in Seattle destined for use in the operation of the "Hull No. 20" when completed as a fishing craft which was worth \$14,160.14 (R. 5). This property, listed in Exhibit B (R. 23-25), was outside of and in addition to the innumerable construction items to be supplied and assembled into the finished "Hull No. 20" by Petersen, the builder, under the agreement of May 14, 1941. The value of this property in Seattle storage was alone the practical equivalent of the amount of the insurance as originally issued on August 20, 1941, and as continued into February, 1942. The value of this property lost by

fire at Seattle, as asserted in plaintiffs' amended complaint (R. 5) was \$14,160.14 in excess of the full purchase price of "Hull No. 20" and of the final amount of insurance to protect the same. Yet, notwithstanding, the plaintiffs claim the Builders' Risk Policy was intended by them to insure against the property consumed by the fire in Seattle.

As based on the values involved, there is another aspect to the contention of the plaintiffs that their Seattle fire damage was covered by the defendant's insurance obligation. The policy named as assured not only Hanney, one of the plaintiffs, but also Petersen, the builder, who was bound by the agreement of May 14, 1941, to perform to the extent of creating out of his materials and labor a vessel worth \$30,000.00. Had some single disaster on the same date destroyed not only all of the plaintiffs' property in Seattle but also "Hull No. 20" at Tacoma, resulting in an aggregate loss of \$44,160.14, could the plaintiffs be allowed any portion of the insurance recovery on account of property in which Petersen, the builder and a named assured, was not interested?

An additional fact weighs against the theory of plaintiffs' demand upon the Builders' Risk Policy. The materials, etc., contemplated by the agreement of May 14, 1941, were wholly items to be used in the *construction* of "Hull No. 20" as a finished vessel. The gear and equipment belonging to the plaintiffs and listed by Exhibit B were, with few possible exceptions, articles to be used in the *operation* of fishing with "Hull No. 20" after completion, delivery

and acceptance at Astoria, Oregon. And at that time and place the policy would have expired by its express positive terms, since it provided that "all trials shall be carried out within a distance by water of 100 nautical miles of the place of construction" and that "in no case shall this insurance extend beyond delivery of the vessel" (R. 22).

During argument to sustain the contention that the Builders' Risk Policy was neither obtained nor issued to insure the plaintiffs' property in storage at Seattle, this brief has largely confined discussion to the interpretive light cast upon the insurance contract by the construction agreement. However, the policy alone contains within itself strength to support the same contention, for which reason and without repetition, reference is made to the "Brief of Appellee" filed upon the earlier appeal (No. 10647).

3. Interest Allowance Excessive.

As a point of lesser importance the defendant has assigned as error allowance of interest by the District Court from February 24, 1942, the date of the fire loss, because the plaintiffs' demand was disputed in good faith not only as to liability but as to the amount which was unliquidated. That disagreement regarding the value of the property destroyed was warranted seems plain when the plaintiffs' claimed \$14,-160.14 by their amended complaint and the verdict awarded only \$7,200.00. These considerations prompt the defendant to urge that interest be granted only from November 10, 1944, the date of judgment—should the same be otherwise affirmed.

CONCLUSION

Patently, it is the principal prayer of the defendant to this Court that the lower court be reversed in this case and be directed to grant the motion for summary judgment of dismissal with costs.

Respectfully submitted,

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IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE CO.
OF PHILADELPHIA, PENNSYLVANIA,
a corporation,

vs.

Appellant,

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PAUL VOHL,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
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DIVISION OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

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IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE CO.
OF PHILADELPHIA, PENNSYLVANIA,
a corporation,

vs.

Appellant,

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DIVISION OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF THE CASE

On the former appeal of this cause, this court held the contract of insurance herein involved was obscure, uncertain and ambiguous and that an issue of fact was thereby presented as to the true intention of the parties

in the making of the builder's risk insurance policy. *Hanney v. Franklin Fire Ins. Co.*, 142 F. (2) 864, 866.

This case comes here upon the appeal of the appellant insurance company from a judgment entered upon a verdict in favor of the appellees. The appellant contends the District Court erred in refusing to grant the appellant's motion for summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure, in entering an order denying such motion and entering final judgment in favor of appellees and against appellant (Rec. 125). No error is assigned as to any ruling or proceeding during the trial before the District Court and a jury impaneled to try the case (Rec. 125, 130). It is conceded by appellant that no error was committed during the trial of the case before the court and jury. (Appellant's Brief, p. 6.)

The motion for summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure was based upon the appellees' amended complaint, the appellant's second amended answer, the depositions of Henry Stackset and Kenneth H. Wheelock, appellant's request for admissions under Rule 36 of the Federal Rules of Civil Procedure and the appellee's "statement in response to request for admissions under Rule 36" (Rec. 39-40). Rule 56 (c) of the Federal Rules of Civil Procedure provides for the granting of a motion for summary judgment when it appears from the pleadings, depositions, affidavits or admissions, etc. there is no "genuine issue as to any material fact" to be tried. The appellees' amended complaint alleged, among other things:

"In September, 1941, and to and inclusive of February 24, 1942, the plaintiffs were the owners of the halibut boat No. 20, and of tackle, apparel, furniture, fixtures and material which belonged to and was destined for the halibut boat No. 20, then being built, all of which property was covered by the provisions of the above described written policy of insurance, and all of which property was stored in locker No. 325 at the Salmon Bay Terminal of the Port of Seattle, City of Seattle, Washington; * * * and all of such personal property was stored in such locker No. 325 during all of such time for the express purpose of being attached to, used upon and in the operation of said halibut boat No. 20 and in the equipping and outfitting and building of said halibut boat No. 20." (Rec. 4, 5.)

and

"that there is due and owing to plaintiffs from defendant the sum of \$14,160.14." (Rec. 5, 6.)

The appellant's second amended answer to appellees' amended complaint alleged:

"* * * (1) the defendant denies that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy; (2) the defendant (in harmony with admissions made and filed in behalf of the plaintiffs herein) denies that the property listed and described by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20;" (Rec. 28.)

and

“The defendant denies there is due or owing to plaintiffs from defendant the sum of \$14,160.14 or any lesser sum.” (Rec. 39.)

The depositions relied upon by appellant are the depositions of Henry Stackset, who testified in such deposition that he sold the tackle, apparel, appurtenances, furniture, fixtures and material to appellees, which was destroyed by the fire, stating the price at which sold and its condition and value, and the discovery deposition of Kenneth H. Wheelock, the agent of the appellant, who sold the builder's risk insurance policy to the appellees, wherein he testified that before delivering the policy to appellees that he read to them and explained certain provisions of the builder's risk insurance policy, but that he did not recall discussing with them the tackle, apparel and other equipment which appellees had stored in their locker at Seattle (Rec. 43-119). The appellant's request for admissions under Rule 36 in substance was as to whether the boat building agreement of May 14, 1941, between one Peterson and the appellee Hanney was genuine; that the performance by said Peterson of such contract did not require the use of tackle, apparel, appurtenances, furniture, fixtures and material which was stored in appellees' locker at Salmon Bay Terminal, Seattle; that such personal property was not incorporated in said Hull No. 20 during its construction by Peterson, and that the performance of said agreement of May 14, 1941, for the building of the Hull No. 20 did not require appellee Hanney to purchase any of such personal property for use

in the construction of such Hull No. 20 (Rec. 26-35). In response to this request for admissions, the appellees, over objection that all such requests for admissions were as to matters which were wholly irrelevant to any issue in the case, answered that the agreement of May 14, 1941 between Peterson and said Hanney appeared to be a true copy of the original agreement for the building of the Hull No. 20 and that such contract did not require the use of all of the personal property destroyed by fire and that the property destroyed by fire was not incorporated in Hull No. 20 under the construction contract of May 14, 1941; and further, that the performance of said building contract of May 14, 1941 did not require Hanney to acquire or provide for the use in the construction of such Hull No. 20 any such personal property destroyed by fire.

The foregoing is the record upon which the appellant made its motion for summary judgment and by reason of the denial thereof seeks a reversal of this cause.

The District Court held the boat building agreement of May 14, 1941 was not a part, by reference or otherwise, of the builder's risk insurance contract sued upon and that the builder's risk insurance policy herein involved was obscure and ambiguous and that it was for the jury to determine from the parol evidence admitted during the trial whether it was the intention of the appellees and appellant to cover or insure the tackle, apparel, appurtenances, furniture, fixtures and materials belonging and destined for Halibut Boat No. 20, building at Brown's Point, Tacoma.

In accordance therewith the trial proceeded, evidence was introduced by appellees and by appellant bearing upon all the circumstances surrounding the making and issuance of the builder's risk insurance policy for the purpose of determining the intention of the parties. Upon the completion of the introduction of evidence, the case was submitted to the jury under concededly correct instructions. A verdict was returned in favor of the appellees. Judgment was entered upon the verdict.

POINTS AND AUTHORITIES

1. On motion for summary judgment the moving party has the burden and all doubts will be resolved against him. A party may not be deprived of the right to a jury trial when there is a genuine issue as to any material fact.

State of Washington v. Maricopa County (9 Cir.)
143 F. (2) 871, 872.

Whitaker v. Coleman (5 Cir.) 115 F. (2) 305,
306, 307.

McElwaine v. Wickwire Spencer Steel Wire Co.
(2 Cir.) 126 F. (2) 210.

Weisser v. Mursan Shoe Corp. (2 Cir.) 127 F. (2)
344, 346.

Ramsouer v. Midland Valley R. Co. (8 Cir.) 135
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Campana Corporation v. Harrison (7 Cir.) 135
F. (2) 334, 335, 336.

Walling v. Fairmont Creamery Co. (8 Cir.) 139
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Snower & Co. v. U. S. (7 Cir.) 140 F. (2) 367, 369.

Consolidated Indemnity & Insurance Co. v. Alliance Casualty Co. (2 Cir.) 68 F. (2) 21, 22.

Fisher v. Sun Underwriters Co., 179 Atl. 702, 705 (R. I.).

Stulsaft v. Mercer Tube & Manufacturing Co., 43 N. E. (2) 31, 33 (N. Y.).

Prime Manufacturing Co. v. Gallun & Sons Corp., 281 N. W. 697, 699, 700, 701 (Wis.).

Walsh v. Walsh, 116 P. (2) 62, 64, 65 (Calif.).

Irving Trust Co. v. Anahma Realty Corp., 35 N. E. (2) 21-24 (N. Y.).

Suslensky v. Metropolitan Life Insurance Co., 43 N. Y. S. (2) 144, 146.

2. Where the complaint alleges facts, proof of which is necessary to enable the plaintiff to recover, which allegations are denied by the answer, a genuine issue as to material fact exists.

State of Washington v. Maricopa County (9 Cir.) 143 F. (2) 871, 872.

Snower & Co. v. U. S. (7 Cir.) 140 F. (2) 367, 369.

Campana Corporation v. Harrison (7 Cir.) 135 F. (2) 334, 336.

Weisser v. Mursan Shoe Corp. (2 Cir.) 127 F. (2) 344, 346.

Consolidated Indemnity Insurance Co. v. Allison Casualty Co. (2 Cir.) 68 F. (2) 21, 22.

3. When an insurance contract is obscure, doubtful or ambiguous, evidence of the facts and circumstances surrounding the issuance of the policy, the relation and situation of the parties, their negotiations and conversations, the subject matter of the insurance and its location, the knowledge of the parties thereof, the business in which the parties are engaged, the objects and purposes of executing the insurance contract and the practical construction given to it by the parties, are admissible to determine the intention of the parties.

Violette v. Queen Insurance Co., 96 Wash. 303, 165 Pac. 65.

Mountain Timber Co. v. Lumber Ins. Co., 99 Wash. 243, 169 Pac. 591.

Montana Stables v. Union Assur. Society, 53 Wash. 274, 101 Pac. 882.

National Bank v. Aetna Casualty Co., 161 Wash. 239, 245, 296 Pac. 831.

Queen Ins. Co. v. Meyer M. Co. (8 Cir.) 43 F. (2) 885.

Messenger v. German-American Ins. Co., 107 Pac. 643, 136 Pac. 438 (Colo.).

University City v. Home Fire Ins. Co. (8 Cir.) 114 F. (2) 288, 294, 299.

Arbuckle v. Lumbermens Mutual Casualty Co. (2 Cir.) 129 F. (2) 791-793, 794.

Dixie Pine Products Co. v. Maryland Casualty Co. (5 Cir.) 133 F. (2) 583, 584.

Eagle Star etc. Ins. Co. v. Fleischman, 2 Atl. (2) 424-427 (Md.).

Norton v. Farmers Auto Etc. Exchange, 105 P. (2) 136, 139, 142 (Calif.).

Husch Bros. v. Maryland Casualty Co., 276 S. W. 1083-1086 (Ky.).

John Sneers Faucet Co. v. Commercial Casualty Co., 99 Atl. 342, 343 (N. J.).

8 *Couch on Ins.*, 7059-7069, Secs. 2183-2187; 7069-7070, Sec. 2188.

26 *C. J.*, 77, 78, Sec. 73, 524, Sec. 736.

1 *Jones on Evidence*, Sec. 170-178, page 167.

3 *Jones on Evidence*, Sec. 453, pages 458-460.

22 *C. J.*, 1179-1183.

32 *C. J. S.*, 891, 896, 901, 911, 912.

4. Parol evidence of facts and circumstances surrounding the execution of an insurance contract, the meaning of which is obscure and ambiguous, introduced to aid its construction, present a genuine issue of a material fact.

Durand v. Heney, 33 Wash. 38, 42, 43, 73 Pac. 775.

Kieburz v. Seattle, 84 Wash. 196, 205, 146 Pac. 400.

Gottstein v. Stusser, 178 Wash. 360, 365, 35 P. (2) 5.

State Bank of Wilbur v. Phillips, 11 Wn. (2) 483, 488, 489, 119 P. (2) 664.

Walsh v. Walsh, 116 P. (2) 62, 64, 65 (Calif.).

Stulsaft v. Mercer Tube & Mfg. Co., 43 N. E. (2) 31, 33 (N. Y.).

Irving Trust Co. v. Anahma Realty Corp., 35
N. E. (2) 21, 24 (N. Y.).

Suslensky v. Metropolitan Life Insurance Co., 43
N. Y. S. (2) 144, 146.

5. Another contract not made a part of a contract by the express terms thereof cannot be considered or made a part of such contract.

Burbank v. Pioneer Mutual Insurance Co., 60
Wash. 253, 110 Pac. 1005.

Benson v Metropolitan Insurance Co., 126 Wash.
125, 127, 217 Pac. 709.

University City v. Home Fire Insurance Co. (8
Cir.) 114 F. (2) 288, 294-299.

Glant v. Lloyd's Register of Shipping, 141 Wash.
253, 251 Pac. 274.

Laughlin v. March, 19 Wash. (2) 874, 877, 145
P. (2) 549.

Short v. Dolling, 178 Wash. 467, 35 P. (2) 82.

II *Cooley's Briefs on Insurance*, 1048 et seq.

32 C. J., 1159, Sec. 269.

13 C. J., 529, 766.

17 C. J. S., 1237, Sec. 592.

6. Contracts of insurance are construed in the same manner as other contracts.

Isaacson Iron Works v. Ocean Accident etc. Co.,
191 Wash. 221, 227, 70 P. (2) 1026.

Goodwin v. Metropolitan Life Insurance Co., 196
Wash. 391, 406-407, 83 P. (2d) 231.

7. After a case has been brought before an appellate court, none of the questions examined and determined, or which might have been examined or determined upon the first appeal, can be reheard or reviewed upon a subsequent appeal.

Fisher v. Bank of America National Trust & Savings Association (9 Cir.) 72 F. (2) 635, 638.

Long Beach Dock & Terminal Co. v. Pacific Dock & T. Co. (9 Cir.) 98 F. (2) 833, 835.

Republican Mining Co. v. Tylar Mining Co. (9 Cir.) 79 F. 733, 735. Cert. den.

Sorensen v. Pyrate Corporation (9 Cir.) 65 F. (2) 982, 985. Cert. den.

Stewart v. Salamon, 96 U. S. 361, 362, 24 L. ed. 1044.

8. Where an insurance policy does not provide for any time of payment of the loss, the insured is entitled to interest from the date of the loss.

Glover v. Rochester German Ins. Co., 11 Wash. 143, 157, 39 Pac. 380, 383.

Young v. Travelers Ins. Co., 125 Wash. 118, 124, 215 Pac. 383, 385.

Concordia Ins. Co. v. School District, 282 U. S. 545-555, 75 L. ed. 528, 542.

Queen Ins. Co. v. Dearborn S. & L. Assoc., 51 N. E. 717, 718 (Ill.).

Home Ins. Co. v. Rowe, 218 S. W. 471, 474 (Ky.).

Hartford Fire Ins. Co. v. Langford, 88 N. W. 779, 782. (Neb.).

Hartford Fire Ins. Co. v. Bernard, 221 Pac. 1061
(Okla.).

Olson v. Herman Farmers Mutual Ins. Co., 203
N. W. 743, 745 (Wis.).

7 *Couch on Ins.*, Sec. 1865, pp. 6186, 6187, 6188.
26 *C. J.*, 575, Sec. 795.

33 *C. J.*, 147, Sec. 886.

9. The amount of a loss cannot be considered unliquidated where the amount of such loss may be ascertained by a reasonably certain calculation by reference to existing market values.

17 *C. J.*, 817.

25 *C. J. S.*, pp. 539, 540, Sec. 52.

10. Where a state supreme court has not definitely ruled regarding the matter of interest, the United States Courts, when necessary to arrive at fair compensation, may exercise their discretion in awarding interest.

Concordia Ins. Co. v. School District, 282 U. S.
545-555, 75 L. ed. 528, 542.

Miller v. Robertson, 266 U. S. 243, 257-259, 69
L. ed. 265, 275, 276.

The President Madison (9 Cir.) 91 F. (2) 835,
845, 847.

11. Where an appeal has been sued out for delay under the court rule and the statute, the appellate court may award damages because of the delay.

*Rule 26, Subdivision 2, Rules of the U. S. Circuit
Court of Appeals for the 9th Circuit.*

28 U. S. C. A., Sec. 878.

Fern Gold Mining Co. v. Murphy (9 Cir.) 7 F. (2) 613, 614.

Slaker v. Connor, 278 U. S. 189, 73 L. ed. 258.

Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 233, 67 L. ed. 961, 964.

Demming v. Carlisle Packing Co., 226 U. S. 102, 57 L. ed. 140.

ARGUMENT

THE DENIAL OF THE MOTION FOR SUMMARY JUDGMENT WAS RIGHT

ON SUCH MOTION APPELLANT HAS THE BURDEN AND ALL DOUBTS ARE RESOLVED AGAINST IT

The assignments of error relied upon for reversal of the judgment of the District Court is the District Court's denial of the motion for a summary judgment. The question to be determined is whether the pleadings, depositions and admissions fail to disclose a "genuine issue as to any material fact." In considering such a motion the burden is upon the appellant and all doubts are resolved against it. If there be any substantial dispute as to a material fact or an issue of a material fact, the motion must be denied. The court is not authorized to try the issue but is only to determine whether there is an issue to be tried. Issue finding rather than issue determination is the pivot upon which summary judgment laws turn. A party may not be deprived of the right to a jury trial

when there is a genuine issue as to any material fact. *State of Washington v. Maricopa County* (9 Cir.) 143 F. (2) 871, 872; *Whitaker v. Coleman* (5 Cir.) 115 F. (2) 305, 306, 307; *McElwaine v. Wickwire Spencer Steel Wire Co.* (2 Cir.) 126 F. (2) 210; *Weisser v. Mursan Shoe Corp.* (2 Cir.) 127 F. (2) 344, 346; *Ramsouer v. Midland Valley R. Co.* (8 Cir.) 135 F. (2) 101; *Campana Corporation v. Harrison* (7 Cir.) 135 F. (2) 334, 335, 336; *Walling v. Fairmont Creamery Co.* (8 Cir.) 139 F. (2) 318, 322; *Snower & Co. v. U. S.* (7 Cir.) 140 F. (2) 367, 369; *Cansolidated Indemnity & Insurance Co. v. Alliance Casualty Co.* (2 Cir.) 68 F. (2) 21, 22; *Fisher v. Sun Underwriters Co.*, 179 Atl. 702, 705 (R. I.); *Stulsaft v. Mercer Tube & Manufacturing Co.*, 43 N. E. (2) 31, 33 (N. Y.); *Prime Manufacturing Co. v. Gallun & Sons Corp.*, 281 N. W. 697, 699, 700, 701 (Wis.); *Walsh v. Walsh*, 116 P. (2) 62, 64, 65 (Calif.); *Irving Trust Co. v. Anahma Realty Corp.*, 35 N. E. (2) 21-24 (N. Y.); *Suslensky v. Metropolitan Life Insurance Co.*, 43 N. Y. S. (2) 144, 146.

In *Whitaker v. Coleman* (5 Cir.) 115 F. (2) 305, there were two suits involving the liability of an insurer on a policy covering the owner as the named insured and "any person while using the automobile * * * with the permission of the named insured." The first was against the owner and driver of the automobile and the second was by the insurance company for a declaratory judgment that it was not liable as insurer. In both cases the appellant demanded a jury. A motion was made by the insurance company for summary judgment, which was granted.

At 115 F. (2) 306, 307, the court said.

“Appealing in each case from the summary judgment against him, appellant is here insisting as to each that there was a genuine issue as to a material fact whether the driver was an ‘insured’ within the policy terms, and that he has been deprived of his right of trial by jury. We think it clear that appellant has been so deprived and that the judgments must be reversed because he has. The invoked procedure, valuable as it is for striking through sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.

Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind. To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. Testing appellant’s offer or proof by this rule, it plainly appears that an issue on which he is entitled to a jury trial has been summarily determined against him.

* * * We think that this will not at all do. Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by

jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

In *Ramsouer v. Midland Valley R. Co.* (8 Cir.) 135 F. (2) 101, the court at pages 105, 106, said:

"We have not reviewed all the evidence bearing upon the particular features stressed by the respective parties, and there is more or less conflict in the testimony, but the issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits."

THE PLEADINGS PRESENTED GENUINE ISSUES AS TO MATERIAL FACTS

The above quoted pleadings clearly establish there was an issue as to a material fact. Appellees' amended complaint, among other things, alleged:

"were the owners of tackle, apparel, furniture, fixtures and material (the property described in Exhibit B) which belonged to and was destined for the halibut boat No. 20, then being built, all of which

property was covered by the provisions of the policy.” (Rec. 5.)

which was Exhibit A to appellees’ amended complaint, and the complaint further alleged:

“that there is due and owing to plaintiffs from defendant the sum of \$14,160.14.” (Rec. 5, 6.)

These allegations were a proper method of pleading. Rule 8 (a)-(e), (1), (f) Federal Rules of Civil Procedure. Appendix of Forms to such Rule 1-12. No attack was made by appellant upon this method of pleading.

The second amended answer of appellant denied these allegations as follows:

“the defendant denies that the property listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy.” (Rec. 38.)

and

“denies there is due or owing the plaintiffs from defendant the sum of \$14,160.14, or any lesser sum.” (Rec. 39.)

This whole controversy depends on whether the property destroyed by fire was insured by the builder’s risk insurance policy. The appellees alleged that it was insured and intended to be insured. The appellant denied that the property destroyed was insured or intended to be insured. This presented a genuine issue as to a material fact. It presented *the* material issue to be determined from the evidence.

Under similar circumstances this court reversed the District Court, which granted a summary judgment in

the case of *State of Washington v. Maricopa County* (9 Cir.) 143 F. (2) 871, 872. It was there said at page 872:

“The pleadings were (1) appellant’s amended complaint hereinafter called the complaint, and (2) appellee’s amended answer thereto, hereafter called the answer. There were no admissions except those in the answer. The answer admitted some allegations of the complaint, denied others and contained allegations which were deemed denied. Some, at least, of the issues thus raised were genuine issues as to material fact.

Thus, instead of showing that there was no genuine issue as to any material fact, the pleadings showed that there was such issue.”

In *Snowder & Co. v. U. S.* (7 Cir.) 140 F. (2) 367, 369, it was said:

“Here the complaint alleged that the plaintiff had borne the burden of the taxes in question. This allegation was specifically denied by defendant’s answer. Thus there was an issue of fact. That this fact was material cannot be denied inasmuch as the statute—Section 902 of the Revenue Act of 1936, 49 Stat. 1747, 7 U. S. C. A., Section 644—makes it a condition precedent to a refund that the claimant establish that he bore the burden of the tax. Because there was such an issue of fact presented by the pleadings the motion for summary judgment should have been denied.”

In *Campana Corporation v. Harrison* (7 Cir.) 135 F. (2) 334, 336, the court said:

“In the case at bar, the Corporation alleged in its complaint that it bore the burden of the tax and

that its dealings with the Sales Company were at arm's length. The Commissioner in his answer denied these allegations. This presented sharp, clear issues of fact. * * * The affidavits did not demonstrate that there were no issues of fact; they demonstrated that there were decided issues of fact. The Commissioner could not be foreclosed on the right to a trial on those issues by the entry of summary judgment."

See also *Weisser v. Mursan Shoe Corp.* (2 Cir.) 127 F. (2) 344, 346. *Consolidated Indemnity Insurance Co. v. Alliance Casualty Co.* (2 Cir.) 68 F. (2) 21, 22.

THE BOAT BUILDING CONTRACT IS NO PART OF THE
BUILDER'S RISK INSURANCE POLICY. THE BUILDER'S
RISK INSURANCE POLICY IS AMBIGUOUS, WHICH
RAISES GENUINE ISSUES OF MATERIAL FACT

But appellant's contention is that the builder's risk insurance policy and the boat building contract are one contract and should be interpreted to the effect that it was the intention of the appellant and appellees that the property destroyed by fire, located at Seattle, was not covered or insured.

The builder's risk insurance policy here involved was dated August 20, 1941, over three months after the making of the boat building contract of May 14, 1941. Appellees were the insured. Appellant was the insurer. The builder's risk insurance policy does not refer to the boat building contract between Peterson and Hanney, dated May 14, 1941, in any manner. It does not by reference

or by express terms make the boat building contract a part of the insurance contract (Rec. 10-20). Obviously there was no agreement or meeting of the minds that the boat building contract should be a part of the builder's risk policy without any such reference or a provision in the insurance contract in express terms making such boat building contract a part of it. The appellant insurance company was not a party to the boat building contract. It was, of course, a physical and legal impossibility for the boat building contract of May 14, 1941 to have made by reference or otherwise the builder's risk insurance policy a part of such contract. The contract of insurance was not negotiated or made until August 20, 1941, and its terms could not be known by any of the parties. Moreover, the boat building contract does not attempt in any manner to make the insurance contract a part of it by reference or by express terms. If it had ever been contended that the appellant was a party to the boat building contract, it would be the first one to repudiate such claim. The only provision contained in such contract with reference to the builder's risk insurance is that Peterson, the first party, would procure the builder's risk insurance, the premium to be paid by Hanney, the second party (Rec. 33).

Inasmuch as the builder's risk insurance contract did not by reference or by express terms make the boat building contract a part of it, the boat building contract is not a part of the insurance contract. *Burbank v. Pioneer Mutual Insurance Co.*, 60 Wash. 253, 110 Pac. 1005; *Benson v. Metropolitan Insurance Co.*, 126 Wash. 125,

127, 217 Pac. 709; *University City v. Home Fire Insurance Co.* (8 Cir.) 114 F. (2) 288, 294-299; *II Cooley's Briefs on Insurance*, 1048 et seq.; 32 C. J., 1159, Sec. 269.

In *Burbank v. Pioneer Mutual Insurance Co.*, 60 Wash. 253, 110 Pac. 1005, an action was commenced against the insurance company to recover a loss sustained by fire. The insurance company pleaded that certain printed matter upon the back of the contract of insurance required the insured to make proofs of loss within sixty days after the fire and furnish other information, and that the making of such proofs of loss was a condition precedent to the right to recover; and further, that no such proofs of loss had been made by the insured. The insurance company offered such printed conditions on the back of the policy in evidence and the trial court rejected the offer. There was involved the question of waiver of proofs or loss, which was decided in favor of the insured. In passing upon the question of whether the printed matter upon the back of the policy was a part of the insurance policy, the Supreme Court of Washington at 60 Wash. 256, 257, 110 Pac. 1006, said:

“The policy was executed upon a printed form prepared by appellant, the terms of which must be liberally construed in favor of the assured. Conditions and stipulations endorsed upon the back of a policy, when sufficiently mentioned in the body of the instrument, will become a part of the contract of insurance itself, with the same force and effect as though they had been recited therein; but if no sufficient reference is made on the face of the policy to such endorsed conditions and stipulations, they can-

not be regarded as a part of the contract, but must be ignored when the policy is being construed to ascertain obligations devolving upon the assured.

“An endorsement on the back of a policy may be regarded as part of the contract, provided it is referred to in the policy as constituting part of it. If, however, there be no reference whatever to it in the policy, nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as the act of the insurer, and not, therefore, binding on the insured. *Stone v. United States Casualty Co.*, 34 N. J. Law, 371; *Kingley v. New Eng. Mut. Fire Ins. Co.*, 8 Cushing 393; *Ferrer v. Home Mut. Ins. Co.*, 47 Vt. 416; *Farmers' Ins. & L. Co. v. Snyder*, 16 Wend. 48; *Bize v. Fletcher*, Doug. 291, note.' *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 240, 7 Atl. 257.”

The above authorities hold that other papers, documents, contracts, printed conditions or stipulations form no part of the contract of insurance except where

“It is referred to in the face of the policy or there is something to show that the parties intended it to be a part of the contract. 32 C. J., 1159, Sec. 269.

Contracts of insurance are to be construed in the same manner as other contracts. *Isaacson Iron Works v. Ocean Accident etc. Co.*, 191 Wash. 221, 227, 70 P. (2) 1026; *Goodwin v. Metropolitan Life Insurance Co.*, 196 Wash. 391, 406-407, 83 P. (2) 231. The Supreme Court of Washington has many times held that another document, paper or statement not referred to or made a part of a contract by the express terms thereof, cannot be con-

sidered or made a part of the contract. *Glant v. Lloyd's Register of Shipping*, 141 Wash. 253, 251 Pac. 274; *Laughlin v. March*, 19 Wash. (2) 874, 877, 145 P. (2) 549; *Short v. Dolling*, 178 Wash. 467, 35 Pac. (2) 82; 13 C. J., 529, 766; 17 C. J. S., 1237, Sec. 592.

in *Laughlin v. March*, 19 Wash. (2) 874, 877, 145 P. (2) 549, it was said:

“The sheet of paper containing the description of the property is not referred to in the declaration; consequently, the certainty of the declaration is not enhanced by it. *Glant v. Lloyd's Register of Shipping*, 141 Wash. 253, 251 Pac. 274, 252 Pac. 943. In that case, it was said, p. 262:

‘We consider it determined in this state that statements on other parts of the writings, not in terms made a part of the writing itself, are not terms of the contract’.”

It is contended that the making of the boat building contract of May 14, 1941 and the making of the builder's risk insurance contract dated August 20, 1941, were a part of the same transaction; this is obviously fallacious. It is far-fetched to say a contract made May 14, 1941 between the boat builder and one of the appellees, to which appellant was not a party, prior to the time that the other appellees had become interested with such appellee, prior to the time that the appellees had negotiated for or purchased the personal property destroyed by fire, prior to the time that they had ever discussed the terms and conditions of the insurance contract with the agent of the appellant, is a part of the insurance contract when

there is not any express reference or provision in the insurance contract that such boat building contract should be considered and made a part of the insurance contract. There is no evidence in the record to prove that the making of the boat building contract and the builder's risk insurance policy were part of the same transaction.

The appellant says "that both contracts were elements or parts of a single transaction" (Appellant's Brief, p. 17), and that the boat building contract and the builder's risk insurance policy were "two interdependent documents" (Appellant's Brief, p. 18). No reference is made to any part of the record to substantiate such statements. No authority is offered to sustain the statements.

Appellant makes several references to the fact that "Hull No. 20" is mentioned in the boat building contract of May 14, 1941 and in the builder's risk policy, and argues that by reason thereof it was *as a matter of law* the intention of the parties to insure only the boat and materials to be used in her construction. Appellant fortifies this claim by referring to appellees' response to appellant's request for admissions, wherein appellees state the boat building contract did not require them to purchase the "tackle, apparel * * * appurtenances, etc. * * * and other furniture and fixtures, and all material" for the construction of the boat, and that such personal property was not used in the construction of the boat. Obviously it was not used in the construction of the boat because it was destroyed by fire. While the builder's risk policy did mention "Hull No. 20," that was not the only property described, for it also insured, in addition to the

hull, the tackle, apparel * * * appurtenances, etc. * * * and other furniture and fixtures and all material belonging and destined for halibut boat hull No. 20." It will be noted that the appellant used the term "halibut boat hull No. 20" in the builder's risk form No. 50 Amended, which further designated the boat as a fishing vessel. In order to render the "halibut boat hull No. 20" fit and usable as a fishing vessel it was necessary to acquire equipment and gear, other than materials used in the construction of "hull No. 20." This the appellees did. Such apparel, tackle, etc. "belonged and was destined for halibut boat hull No. 20." An examination of the list of such gear and equipment (Rec. 23-25) readily discloses that none of such gear or equipment was intended to be used in the construction of the hull. It has never been contended by the appellees that webbing, cables, cork, purse blocks, etc. were materials to be used in the construction of the hull. Such property might very accurately come within the description of "tackle, apparel, furniture, fixtures or appurtenances." It always has been contended by appellees that such described personal property "belonged and was destined for halibut boat hull No. 20" and that it was the intention of the parties to insure such personal property under the above language. This is part of the language this court held on the former appeal to be obscure and ambiguous. Appellant has at all times known all the foregoing before, during and since the former appeal. Nothing said by appellant has rendered the insurance contract clear, certain and unambiguous. The language of the insurance contract has not changed.

There is nothing in the boat building contract which changes its language. The injection of the boat building contract into the case has not clarified the insurance contract. It would seem that appellant has endeavored to create further obscurity and ambiguity rather than clarification.

The contention of appellant here is to all purposes and effect the same contention made upon the former appeal. The principal contention of the appellant upon such appeal was that property located at Seattle was not intended to be insured, *as a matter of law*, for the reason that the policy only covered materials located at Tacoma which were to be used in the construction of the hull.

In the brief of appellee upon the former appeal, No. 10647, appellant, then appellee, said:

“Appellee claims that to review the language of the same two clauses upon which appellants rely, and to analyze their language in the light of context, is to reach the conclusion that those clauses themselves plainly and clearly disclose a purpose to limit the property insured to materials assembled in or intended for the vessel against risks in, of and about the facilities used for the construction thereof at the time and place of the work.”

The appellant here is again arguing that the contract of insurance, heretofore held by this court to be obscure and ambiguous, is not ambiguous. Appellant now contends, *as a matter of law*, the policy clearly shows that the property destroyed by fire was not insured under the terms of the policy; that is exactly what the appel-

lant argued on the former appeal. If the appellant has used different language, in any event the same contention was made; and if such contention was not made, it could have been made because appellant knew then as well as now that none of the property destroyed by fire was ever contemplated to be used by the appellees in the construction of the hull. Indicating very clearly that it is again appellant's contention that the policy, plus the boat building contract, which as a matter of law cannot be considered a part of the insurance contract, does not create any ambiguity or uncertainty and that therefore the property destroyed by fire was not insured or covered by the policy, it argues at page 20-22 of its brief, that because the total building price was \$30,000.00 and the total insurance \$30,000.00, therefore there was no intention to also include and insure the personal property destroyed by fire located at Seattle, which appellees valued at \$14,160.14. There are several answers to this contention. The insurance was \$15,000.00 on August 20, 1941, when only the keel was laid. Therefore the insureds had ample protection. The builder had ample protection because during the course of the building he was paid in installments and at or about the time of the fire had been paid some \$19,500.00. The hull and materials for same were located at Tacoma and the gear and equipment was located at Seattle. Appellees may have felt it was very improbable a fire would take place in two places on the same day and unless there was a fire on the same day at both places, causing a total loss, they were amply protected. The appellees were not required to fully insure

themselves. In addition the property was not worth \$14,160.14, for the jury found it was worth \$7200.00 at the time of the fire. As to the gear and equipment not being insured after delivery of the vessel, there was nothing to prevent the appellant from extending the insurance, or it was covered by the hull insurance policy issued by Hansen & Rowland Inc. The argument of appellant has not made the builder's risk insurance policy any less obscure or ambiguous.

The boat building contract of May 14, 1941 was introduced in evidence as Defendant's Exhibit A-1 and all the foregoing argument contained on pages 20-23 of appellant's brief were made to the jury. The District Court permitted the jury to consider the boat building contract and the builder's risk insurance policy along with the other evidence. The jury determined all of appellant's foregoing contentions adversely to appellant.

This court on the former appeal of this case, 142 F. (2) 864, held that the builder's risk insurance policy was "obscure," which is tantamount to saying that it was indefinite, uncertain and ambiguous. At 142 F. (2) 866 it was said:

"For our part we think the language of the contract, as applied to the situation disclosed in the pleading, leaves the subject in considerable obscurity. * * * The phrase in part descriptive of the property covered, namely, 'all material belonging and destined for' the boat, may in appropriate circumstances be broadly applied without doing violence to other descriptive matter. The word 'destine' or 'destined' conveys the idea of predetermination. As defined by

Webster, it means, among other things, to appoint, to design, to set apart or designate. * * * The true intent of the engagement may perhaps be clarified by the showing made in the course of a trial, by facts and circumstances then in evidence, the practical construction, if any, given the contract by the parties, or by proof of custom and usage in the locality. * * * The motion should have been denied, with leave to answer, and the parties given opportunity to make their respective showings.”

The foregoing language of the opinion clearly indicates that the plaintiffs and the defendants were to be given an opportunity to present parol evidence to establish the intention of appellees and appellant, or as the court said, “the true intent of the engagement.”

Such respective showings were of course the evidence of the facts and circumstances surrounding the issuance of the builder’s risk insurance policy, which involved a showing or evidence as to the relation and situation of the parties, their negotiations and conversations, the subject matter of the insurance and its location, the knowledge of the appellant thereof, the business in which the appellees and appellant were engaged at the time, the object and purpose of appellees and appellant in executing and delivering the insurance policy and the practical construction given the contract by the parties, all for the purpose of determining the intention of the parties at the time of the making of the builder’s risk insurance policy, and the intention of the parties as to whether or not the property destroyed by fire was covered by the terms of such builder’s risk insurance policy.

Such evidence as above described is always admissible to determine the true intent of the parties to an ambiguous contract. *Violette v. Queen Insurance Co.*, 96 Wash. 303, 165 Pac. 65; *Mountain Timber Co. v. Lumber Ins. Co.*, 99 Wash. 243, 169 Pac. 591; *Montana Stables v. Union Assur. Society*, 53 Wash. 274, 101 Pac. 882; *National Bank v. Aetna Casualty Co.*, 161 Wash. 239, 245, 296 Pac. 831; *Queen Ins. Co. v. Meyer M. Co.* (8 Cir.) 43 F. (2) 885; *Messenger v. German-American Ins. Co.*, 107 Pac. 643, 136 Pac. 438 (Colo.); *University City v. Home Fire Ins. Co.* (8 Cir.) 114 F. (2) 288, 294, 299; *Arbuckle v. Lumbermen's Mutual Casualty Co.* (2 Cir.) 129 F. (2) 791-793, 794; *Dixie Pine Products Co. v. Maryland Casualty Co.* (5 Cir.) 133 F. (2) 583, 584; *Eagle Star etc. Inc. Co. v. Fleischman*, 2 Atl. (2) 424-427 (Md.); *Norton v. Farmers Auto etc. Exchange*, 105 P. (2) 136, 139, 142 (Calif.); *Husch Bros. v. Maryland Casualty Co.*, 276 S. W. 1083-1086 (Ky.); *John Sneers Faucet Co. v. Commercial Casualty Co.*, 99 Atl. 342, 343 (N. J.); 8 *Couch on Ins.*, 7059-7069, Secs. 2183-2187; 7069-7070, Sec. 2188; 26 *C. J.*, 77, 78, Sec. 73, 524, Sec. 736; 1 *Jones on Evidence*, Sec. 170-178, 167; 3 *Jones on Evidence*, Sec. 453, pages 458-460; 22 *C. J.*, 1179-1183; 32 *C. J. S.*, 891, 896, 901, 911, 912.

Such facts and circumstances surrounding the transaction, as above described, raise material issues of fact. There are bound to be conflicts in the evidence as to the facts and circumstances surrounding the issuance of the builder's risk policy, regarding the relation and situation of the parties, pertaining to their negotiations and con-

versations, the knowledge of each of them, the business in which they each are engaged, the object and purpose of executing the insurance policy and the practical construction given the contract by the parties. Different inferences may be drawn from such evidence. Reasonable minds might reach different conclusions. All these matters raise genuine issues as to a material fact. *Durand v. Heney*, 33 Wash. 38, 42, 43, 73 Pac. 775; *Kieburts v. Seattle*, 84 Wash. 196, 205, 146 Pac. 400; *Gottstein v. Stusser*, 178 Wash. 360, 365, 35 P. (2) 5; *State Bank of Wilbur v. Phillips*, 11 Wash. (2) 483, 488, 489, 119 P. (2) 664; *Walsh v. Walsh*, 116 P. (2) 62, 64, 65 (Calif.); *Stulsaft v. Mercer Tube & Mfg. Co.*, 43 N. E. (2) 31, 33 (N. Y.); *Irving Trust Co. v. Anahma Realty Corp.*, 35 N. E. (2) 21, 24 (N. Y.); *Suslensky v. Metropolitan Life Insurance Co.*, 43 N. Y. S. 144, 146.

The case of *Durand v. Heney*, 33 Wash. 38, 73 Pac. 775, is in point. There was there involved an ambiguous written contract. At 33 Wash. 41, 73 Pac. 776, 777, the court said:

“We think it may also be conceded that there are certain well defined exceptions to this rule—as, where the identity of the subject-matter of a document, or its construction, depends upon collateral facts or extrinsic circumstances, the inferences from such facts, when they are proven, should be drawn by the jury. Where it is an enforceable contract, and the ambiguity arises as to the relative responsibilities and duties of the respective parties under the contract, which responsibilities and duties can be determined either by proof of the meaning of the terms

used in the contract or by a showing of the circumstances surrounding the parties with reference to the subject-matter of the contract at the time it was entered into, and there is any controversy over such facts, undoubtedly such contract should be submitted to the jury, and its meaning determined by that tribunal by aid of such explanatory testimony."

In *Kiebertz v. Seattle*, 84 Wash. 196, 146 Pac. 400, the Supreme Court of Washington at 84 Wash. 205, 146 Pac. 404, said:

"On the other hand, if the contract be of doubtful interpretation, the question was properly submitted to the jury, and their verdict is conclusive against a recovery if there was a substantial conflict in the evidence, and the question was submitted under proper instructions. As to the evidence, we think there was a substantial conflict. True, the conflict was between the experts. But the question was one on which it was proper to take the opinions of experts; and, clearly, where such evidence is properly submitted to a jury, it is as much their province to determine between the conflicting opinions as it is their province to determine between other forms of disputed evidence, and their verdict upon the one is as conclusive as it is upon the other."

These cases were followed in *State Bank of Wilbur v. Phillips*, 11 Wash. (2) 483, 119 P. (2) 664, where the court held that the agreement there involved was ambiguous and quoted from the case of *Durand v. Heney* (supra). At 11 Wash. (2) 490, 119 P. (2) 667, the court said:

“We hold, therefore, that the contract or agreement was ambiguous, that the court properly allowed the introduction of oral testimony to explain its meaning, and that the jury was justified in finding, from all the facts and the surrounding circumstances, that the amount specified in the order was not to be paid to appellant until such time as respondents’ house was completed by W. K. Deal.”

In *Walsh v. Walsh*, 116 P. (2) 62, the Supreme Court of California had before it an appeal from a judgment of dismissal based upon the granting of defendant’s motion for a summary judgment. The litigation involved the interpretation of a property settlement agreement and a subsequent agreement made between the parties. The plaintiff contended for an interpretation of the meaning of the words “child or children” as used in the contract, and the defendant contended for a different interpretation of such words. The California statute providing for the entry of a summary judgment is very similar to Section 56 (c) of the Federal Rules of Civil Procedure. At page 64 the court said:

“Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived.”

In passing on the merits, the court at page 65 said:

“We are of the opinion from a reading of paragraph VIII that the words ‘child or children’ as there used are ambiguous and indefinite. The words, flex-

ible in character, are of varying meanings, sometimes defined as synonymous with minor, at other times employed to denote relationship with regard to parentage irrespective of age. On its face the phraseology of this paragraph considered in its entirety is reasonably consistent with either of the interpretations advanced here by the litigants. When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.*' *Barlow v. Frink*, 171 Cal. 165, 173, 152 P. 290, 292. (Italics added.) The governing principle as to when parol testimony may be introduced to explain the language of a contract or to ascertain the intention of the parties is clearly set forth in *Kenney v. Los Feliz Investment Co., Ltd.*, 121 Cal. App. 378, 386, 387, 9 P. 2d 225, 229, as follows: 'It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and the declarations of the parties during the negotiations at and before the execution of the contract may be shown. *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 P. 876.' And in *Scott v. Sun-Maid Raisin Growers Ass'n*, 13 Cal. App. 2d 353, at page 359, 57 P. 2d 148, at page 151 the court stated: 'When the meaning of the language of a contract is uncertain or doubtful and parol

evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact * * **. *Thomson v. Leak*, 135 Cal. App. 544, 548, 27 P. (2) 795; *Gallatin v. Markowitz*, 139 Cal. App. 10, 13, 33 P. (2) 424; *Coats v. General Motors Corp.*, 3 Cal. App. (2) 340, 356, 39 P. (2) 838'. (Italics added.)

Applying the rules of law above stated, it is clear that the trial court should have denied defendant's motion for a summary judgment so that the issue raised between the parties hereto as to the duration of defendant's undertaking to furnish support and maintenance to the plaintiff might be tried upon its merits. The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact. The use made of the statute in this case was a perversion and an abuse of it."

Stulsaft v. Mercer Tube & Mfg. Co., 43 N. E. (2) 31 (N. Y.), is another case wherein in order to determine whether or not an employment agreement met the requirements of the statute of frauds and where it was held that parol evidence was admissible in connection therewith, a summary judgment had been entered in favor of the defendant, from which the plaintiff appealed. In reversing the judgment granting defendant's summary judgment, it was said at page 33:

"Here the writing does not expressly state that the plaintiff's existing employment is continued upon the same terms or upon customary terms. It is, however, fairly open to the construction that the words 'you can now consider yourself the exclusive sales agent for Florida and New England territories, for

the next ten years' was intended as a description of an agreement complete in all its terms, leaving nothing open for future discussion or agreement even though there may have been no previous oral discussion or express agreement upon such terms. Parol evidence of the relations of the parties and of custom might not only support such construction of the writing, but might identify the terms and conditions which would fit the description of 'exclusive sales agent' of the defendant corporation. 'To give heed to these things is not to ignore the rule that the writing must contain all the material terms of the agreement. It is to explain the memorandum without changing or enlarging it.' *Marks v. Cowdin*, supra, 226 N. Y., page 145, 123 N. E., page 141. The construction and sufficiency in law of the memorandum must in this case await trial at which proof of the existing relations of the parties and other circumstances known to both parties may clarify the meaning of the letter and identify the terms of the employment."

In *Irving Trust Co. v. Anahma Realty Corp.*, 35 N. E. (2) 21 (N. Y.), the Court of Appeals of New York again reversed an order of the lower court granting summary judgment. The case involved the interpretation of an agreement granting certain easements of light and air and imposing certain restrictions. There had been a reorganization of the mortgagor and a foreclosure of a mortgage involving the appointment of a receiver, together with the making of another agreement between the successor parties and the defendant. The question of the con-

struction of the provisions of the agreement became necessary. At pages 24 and 25 the court said:

“Construction must follow in the light of the intention, position and changed position of the parties after a full disclosure of all the facts and circumstances which may have a bearing thereon. * * * Determination of the issues in the present action depends, in part at least, upon events which occurred subsequent to the commencement of the prior action (281 N. Y. 798, 24 N. E. 2d 480) and upon facts pleaded extrinsic of the written contract. Different questions of fact are tendered for decision. * * * Upon various issues presented by the pleadings in the present action we make no decision since we are convinced that the record does not present a case for summary judgment in whole or in part and that all the issues properly raised by the pleadings should be presented to a trial court.”

The foregoing cases indicate what this court had in mind when it decided this case on the former appeal. In accordance therewith a trial was had before a jury, whereat the appellees and appellant were given an opportunity “to make their respective showings.”

APPELLANT MAY NOT AGAIN LITIGATE QUESTIONS
WHICH WERE OR MIGHT HAVE BEEN
LITIGATED ON THE FORMER APPEAL

The motion for summary judgment upon the grounds made, did not raise any new question that was not decided or could have been decided by this court upon the former appeal. True it is that the motion for summary

judgment is also based upon two depositions, one of the witness Henry Stackset, whose deposition was read during the trial, which contained only evidence as to his having sold the property destroyed by fire to the appellees, its condition and value (Rec. 45-89), and the deposition of Kenneth H. Wheelock, the authorized agent of the appellant, who sold the builder's risk insurance policy to the appellees, in which deposition he admitted reading and explaining to the appellees certain clauses of the builder's risk insurance policy (Rec. 89-119). All of which are wholly immaterial to the question here involved. (Appellant's Brief, p. 11.)

The appeal of the appellant only raises the same question that was considered upon the former appeal. The appellant again contends that according to its interpretation of the builder's risk insurance policy, plus the boat building contract, which we have established cannot be considered in interpreting such insurance contract, it was the intention of the parties that the property destroyed by fire was not covered by the builder's risk insurance policy. That is the same contention appellant made in this court upon the former appeal. The decision of this court upon that appeal became the law of the case and the question now raised is frivolous and moot. This, in effect, is but an appeal by the appellant from a decision of this court to this court.

It is settled law that after a case has been brought before this court and decided, that none of the questions examined and determined upon the first appeal can be reheard or reviewed upon a subsequent appeal. The only

question attempted to be now reviewed on this appeal is whether the decision of this court on the former appeal was right or wrong. *Fisher v. Bank of America National Trust & Savings Association* (9 Cir.) 72 F. (2) 635, 638; *Long Beach Dock & Terminal Co. v. Pacific Dock & T. Co.* (9 Cir.) 98 F. (2) 833, 835; *Republican Mining Co. v. Tylar Mining Co.* (9 Cir.) 79 F. 733, 735, cert. den.; *Sorensen v. Pyrate Corporation* (9 Cir.) 65 F. (2) 982, 985, cert. den.; *Stewart v. Salamon*, 96 U. S. 361, 362, 24 L. ed. 1044.

A very similar situation to that presented on this appeal existed in the case of *Fisher v. Bank of America* (9 Cir.) 72 F. (2) 635. This court held the District Court had correctly interpreted the Circuit Court of Appeal's decision and mandate on the first appeal. The court then quoted at 72 F. (2) 638 from *Roberts v. Cooper*, 20 How. (61 U. S.) 467, 481, 15 L. ed. 969, as follows:

“ ‘But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on

petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members'."

Another case squarely in point on this question is that of *Long Beach Dock & Terminal Co. v. Pacific Dock & T. Co.* (9 Cir.) 98 F. (2) 833. In speaking of the assignment of error upon this appeal, this court said at 98 F. (2) 835:

"Thus, in substance and effect, each assignment is that the trial court erred, in that it obeyed, and refused to violate, the mandate of this court."

The appellee moved to dismiss the appeal upon the following grounds:

" 'The appeal in effect assigns as error on the part of the trial court only its action in obeying the mandate of the Circuit Court of Appeals on the prior appeal'."

In granting such motion this court, at 98 F. (2) 835, said:

"The motion is well founded. The sole question attempted to be raised on this appeal is whether our decision on the former appeal was right or wrong. Appellant contends that it was wrong, and that, therefore, our mandate was wrong and should not have been obeyed. That the mandate was obeyed, and that the decree was in conformity therewith, is conceded. Thus the decree was, in effect, our decree, and the present appeal is 'from ourselves to ourselves'."

It is clear that appellant's motion for summary judgment and its appeal from the denial thereof raises again in this court only the question of the interpretation of the builder's risk insurance policy. That has already been interpreted by this court upon the first appeal. It was there held that the contract of insurance was ambiguous or obscure. The questions raised on the first appeal cannot now be relitigated on this appeal. The appellant has presented nothing new for the consideration of this court upon this appeal.

THE EVIDENCE UPON THE TRIAL PROVES THERE WERE GENUINE ISSUES OF MATERIAL FACTS

The record establishes there were genuine issues as to material facts. The testimony of the appellees, Mikelsen, Hanney and Vohl and the testimony of Wheelock, appellant's agent who sold the builder's risk insurance policy, establish such issues. Appellee Mikelsen testified that on August 20, 1941, they bought gear which was located at Fisherman's Dock in Ballard and he and Hanney asked Wheelock if the stuff stored in the locker was covered. Wheelock said, "Yes, it covers everything." Asked whether different clauses and conditions of the policy were discussed with Wheelock upon that occasion, he stated that they were and that Wheelock read to them the following clauses of the policy:

* * * on hull, tackle, apparel, ordnance, munitions, artillery, engines, boilers, machinery, appurtenances, etc. (including plans, patterns, molds, etc.) boats and other furniture and fixtures and all material be-

longing and destined for—halibut boat hull No. 20 building at—Brown's Point, Tacoma, Washington, as per clauses hereinbelow specified."

"This Insurance is also to cover all risks, including fire, while under construction and/or fitting out, including materials in Buildings, Workshops, yards and docks of the assured, or on quays, pontoons, craft, etc., and all risk while in transit to and from the works and/or the vessel wherever she may be lying, also all risks of loss or damage through collapse of supports or ways from any cause whatever, and all risks of launching and breakage of the ways."

Wheelock said: This policy cover you with everything." (Sup. Rec., 161-163). He further testified that they told Wheelock the fishing equipment and gear was at the Salmon Bay Terminal in locker 325 and that they had purchased it from Henry Stackset and that they wanted it covered, and that Wheelock then said, "Yes, it is covered." (Sup. Rec. 165-166.) Mikelsen further testified that after the fire he went to Wheelock and said, "Well, how about the money. We got some money coming now from the insurance," and Wheelock said, "Oh yes, but you know the insurance company is always slow paying but I will do the best I can to get it for you." (Sup. Rec. 181.)

Appellee Hanney testified they started to build the boat in August and that he and Mikelsen went to Wheelock's office and told him that the boat was being built, talked about builder's risk insurance and about supplies and property they had at other places, and that Wheelock said, "Well, whatever you buy is insured, whether you

have it in Tacoma or Seattle or any place else it would be insurance." And that they then said, "All right"; that they told Wheelock they were buying Stackset's equipment and fishing gear; that Wheelock had a form of the policy which was later written up, they not having received the insurance policy for three or four weeks after its being written, and he read portions of the policy to them, saying, "Here it is, your stuff is covered right here," and that Wheelock read the two clauses above set forth, which Mikelsen testified were read to them, and stated that those clauses covered them (Sup. Rec. 198-202).

The appellee Vohl testified that he talked with Wheelock, appellant's agent, asked him to renew the policy and asked him whether the stuff they had stored at Fisherman's Dock was covered and that Wheelock said, "Yes it was." (Sup. Rec. 304.)

Wheelock, appellant's agent, when asked whether he had any such conversations with Mr. Hanney, Mr. Mikelsen or Mr. Vohl regarding the purchase of insurance of equipment stored in locker 325, Salmon Bay Terminal, testified: "No, I have no recollection of any such conversations at any time with reference to the things that I have heard here in the last two days," and that no such conversation pertaining to any of that material was had (Sup. Rec. 333). He denied having had any conversation with Mikelsen after the fire relating to collecting the insurance money (Sup. Rec. 334). On cross-examination he admitted having read to the appellees, first, the second clause above mentioned, and second, another clause fur-

ther down in the policy pertaining to trial trips and with considerable reluctance and equivocation finally admitted he read and explained to the appellees the first clause mentioned in the testimony of appellees Mikelsen and Hanney regarding "tackle, apparel * * * appurtenances, etc. * * * and other furniture and fixtures and all material belonging and destined for halibut boat hull No. 20." He admitted that it would have been the natural thing for him to have read such clause to them first (Sup. Rec. 342).

The foregoing testimony shows there was a conflict in the evidence concerning the negotiations, conversations and surrounding circumstances involving the purchasing and issuing of the builder's risk insurance policy. Such evidence was a part of "the respective showings" of the appellant and appellees and "facts and circumstances."

Regarding the "practical construction, if any, given the contract by the parties," there were two very cogent and convincing items of evidence consisting of appellees' Exhibits 4 and 5. When the appellees could not collect on the builder's risk insurance policy and placed the hull insurance with Hansen & Rowland Inc. at Tacoma, the appellees authorized Hansen & Rowland Inc. to endeavor to collect the insurance money from the appellant. In attempting to do so, Hansen & Rowland Inc. wrote a letter under date of June 8, 1942, to the appellant in connection with the fire loss, and among other things stated:

"The policy recites under Clauses for Builder's Risks, 'including materials In Buildings, Workshops,

yards and docks of the assured, or on quays, pontoons, craft, etc.' It is the assured's contention the material was located in building under rental to him, and the property lost was intended for the vessel under construction and covered by the policy." (Sup. Rec. 289.)

In response to this letter and on June 18, 1942, the appellant wrote Hansen & Rowland Inc., in answer to its letter to the appellant under date of June 8, 1942, saying among other things:

"You quote a clause under 'Clauses for Builder's Risks' of the policy, particularly the words 'including materials in buildings, workshops, yards and docks of the assured . . .' You then state this language covers material not in a building of which a portion is rented to the assured.

"It is our position that your interpretation of this policy in effect deletes from the clause the words 'of the assured.' If these words mean anything they mean what they say; namely, the buildings, workshops and yards of which the assured has complete dominion. The policy was clearly never intended to cover material placed in lockers in any building regardless of type of hazard.

"We trust that Mr. Hanney will understand why his loss does not constitute a proper claim under our policy, as the materials which he lost were not in buildings, workshops, yards or docks or on quays, pontoons, craft or other similar property owned by him." (Sup. Rec. 294, 295.)

It will be observed the appellant, at the time of writing such letter, took the position that there was no liability

because the appellees did not own the building in which the destroyed personal property was located at the time of the fire. There is not one word in the letter to the effect that liability is denied upon the ground that the "tackle, apparel, * * * appurtenances, etc. * * * furniture and fixtures, and all materials belonging and destined for—hali-but boat hull No. 20" was not covered under such language or because it was not personal property "belonging and destined for" the vessel. It is apparent the appellant placed an entirely different interpretation upon the builder's risk insurance policy on June 18, 1942, than it did after suit was commenced. The foregoing portion of this letter was an implied admission of liability. It placed the denial of liability upon an entirely untenable ground. These letters were read to the jury and were for the jury's consideration in determining the intention of the parties.

THE ALLOWANCE OF INTEREST WAS RIGHT

The builder's risk insurance policy does not provide for any time for the payment of the loss. Therefore the appellees are entitled to interest from the date of the fire. This is the law and is sustained by a long line of cases. *Glover v. Rochester Berman Ins. Co.*, 11 Wash. 143, 157, 39 Pac. 380, 383; *Young v. Travelers Ins. Co.*, 125 Wash. 118, 124, 215 Pac. 383, 385; *Concordia Ins. Co. v. School District*, 282 U. S. 545-555, 75 L. ed. 528, 542; *Queen Ins. Co. v. Dearborn S. & L. Assoc.*, 51 N. E. 717, 718 (Ill.); *Home Ins. Co. v. Rowe*, 218 S W. 471, 474 (Ky.); *Hartford Fire Ins. Co. v. Langford*, 88 N. W. 779, 782

(Neb.); *Hartford Fire Ins. Co. v. Bernard*, 221 Pac. 1061 (Okla.); *Olson v. Herman Farmers Mutual Ins. Co.*, 203 N. W. 743, 745 (Wis.); 7 *Couch on Ins.*, Sec. 1865, pp. 6186, 6187, 6188; 26 *C. J.*, 575, Sec. 796; 33 *C. J.*, 147, Sec. 886.

In *Glover v. Rochester German Ins. Co.*, 11 Wash. 143, 157, 39 Pac. 380, the fire took place on January 9, 1893. The policy had a provision for arbitration and a provision providing for payment sixty days after proofs of loss were submitted. An arbitration was had which was set aside and the clause for the payment sixty days after proofs of loss was waived. At 11 Wash. 157, 39 Pac. 383, the Supreme Court of Washington said:

“The last contention is as to the date from which interest should be allowed. The plaintiff in his complaint prayed for interest from March 29, and the court allowed interest therefrom. The policies provided, in case of a difference of opinion between the insurer and the insured as to the amount of the loss, for payment sixty days after proofs of loss were submitted. But this clause was for the benefit of the insurer, and by agreeing to arbitrate, it was waived, and there was no error in allowing interest from the time it was prayed for.”

It would appear from this decision that had the plaintiff prayed for interest from the date of the loss that it would have been allowed. In all probability interest was not prayed for from the date of the loss because of the sixty-day clause.

In *Young v. Travelers Ins. Co.*, 125 Wash. 118, 124,

125, 215 Pac. 383, the trial court allowed interest from September 8, 1919, the date upon which the insurance company advised the plaintiff that it had issued no insurance policy to J. R. Young. At 125 Wash. 125, 215 Pac. 385, the court said:

“The appellant insurance company assigns error on this ruling, contending that interest should be allowed only from a much later date. The plaintiff’s appeal is based on the contention that interest should be allowed from the date of the issuance of the policy. But we find no error in the conclusion of the court. By the terms of the policy, no action would lie thereon until sixty days after the proofs of death reached the office of the insurance company, and interest would not commence to run until the right of action accrued. There was, therefore, a day of grace, and, from the record, we cannot say that the court did not correctly determine it.”

In *Queen Insurance Co. v. Dearborn S. & L. Assoc.*, 51 N. E. 717, 718 (Ill.), it was said:

“Unless the contract as to the mortgagee entitled the company to 60 days or some other time in which to pay, the amount was due immediately upon the loss, and as we have construed that contract interest allowed from that date was proper.”

The rule is stated in 26 C. J., 575-576, Sec. 795, as follows:

“As a rule interest on the amount to which plaintiff is entitled should be allowed from the time when the loss is due and payable. Interest may be allowed from the date of the loss where there is no provision

in the policy extending or otherwise fixing the time for payment, or where, although there is such a provision, it has been waived by the insurer."

In 33 *C. J.*, 147, Sec. 886, it is stated:

"Interest may be allowed from the date of the loss or injury where the policy or contract is not definite as to the time when the insurance is to be paid, or where, although there is a provision fixing the time of payment, such provision has been waived by the company."

Appellant presents no authority to sustain its contention that interest from the date of the fire should not have been allowed appellees. It is probably appellant's claim the amount was unliquidated. However, it is the rule that when the amount is "subject to reasonably certain calculation by reference to existing market values," it cannot be considered unliquidated. 17 *C. J.*, 817; 25 *C. J. S.*, 539, 540, Sec. 52. Appellee's witness Ben Smith testified that on February 24, 1942 fishing gear and equipment of the type described in plaintiff's Exhibit 2 (the inventory of the property purchased from Stackset) had a market value (Sup. Rec. 322). Therefore, under the foregoing rule appellees are in any event entitled to interest from the date of the fire.

Should this court determine the Supreme Court of Washington has not decided the point here involved, it is the law in the United States courts that interest may be allowed even in cases of unliquidated damages when it is necessary to arrive at fair compensation for the withholding of money. *Concordia Ins. Co. v. School District*, 282

U. S. 545-555, 75 L. ed. 528, 542; *Miller v. Robertson*, 266 U. S. 243, 257-259, 69 L. ed. 265, 275, 276. See also *The President Madison* (9 Cir.) 91 F. (2) 835, 845, 847.

The rule is stated in *Concordia Ins. Co. v. School District*, 282 U. S. 545, 554, 555, 76 L. ed. 528, 543, as follows:

“In the absence of an authoritative state decision to the contrary, there was nothing in either which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in a case of unliquidated damages, ‘when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages’.”

The District Court was right in allowing interest from the date of the fire for the reasons before set forth. The appellant has been wrongfully withholding the money due the appellees upon the builder’s risk insurance policy since the date of the fire. The appellant has deprived the appellees of the use of such money and itself has had the use of such money. Justly and equitably “interest or its equivalent” should be allowed appellees.

THE APPEAL IS FRIVOLOUS. DAMAGES FOR
THE DELAY SHOULD BE AWARDED
APPELLEES

The appeal is without merit. It is so insubstantial as to be frivolous. Appellant’s brief amounts to nothing more than recital of the steps in this litigation, plus the opin-

ion of appellant as to the legal effect of the same. No authority on any question is cited. While the opinion of the authors of appellant's brief may be interesting to someone, it is not one bit interesting to appellees. While this appeal has been pending, appellees are losing the use of their money. Because of this appeal they have been compelled to incur additional expenses in attorney's fees and costs of printing their brief, which are not taxable. Nothing that this court has not already passed upon has been presented for consideration. Perhaps it is appellant's purpose to make the collection of appellees' judgment as costly as possible so that their net recovery will be substantially reduced. It may be believed such strategy is wise; but whatever the purpose of appellant, it is clear that the appeal was sued out for delay. Appellees invoke Rule 26, Subdivision 2 of the rules of this court and 28 U. S. C. A., Sec. 878 and pray for and submit that damages at the rate of ten per cent, in addition to interest, should be awarded appellees upon the amount of the judgment. *Fern Gold Mining Co. v. Murphy* (9 Cir.) 7 F. (2) 613, 614; *Slaker v. Connor*, 278 U. S. 189, 73 L. ed. 258; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U. S. 226, 233, 67 L. ed. 961, 964; *Demming v. Carlisle Packing Co.*, 226 U. S. 102, 57 L. ed. 140.

CONCLUSION

It was held on the former appeal the builder's risk insurance policy was obscure and ambiguous. The boat building contract is not a part of the insurance policy and

cannot be considered with it on the motion for summary judgment. The former decision of this court made the law of the case. It was controlling on the hearing on a motion for summary judgment and the District Court obeyed the mandate of this court in denying such motion. The appellant again contends the builder's risk insurance policy is not ambiguous and that it must be construed as providing no insurance or coverage for the property destroyed. There is nothing new in this contention and appellant is again asking this court to review its own decision. If the boat building contract could be considered as a part of the builder's risk insurance policy, it does not render the insurance contract any the less ambiguous. The pleadings presented a genuine issue as to a material fact. No authority has been presented by appellant to sustain its position, unless such authority be the opinions of the authors of appellant's opening brief. Were it not for the fact appellant had assigned error on the question of interest, appellees would have been compelled to move for a dismissal of this appeal on the ground that it was frivolous and moot. Interest was properly allowed by the District Court and appellant has not proved any reason why it should be disallowed. The judgment of the District Court was right and this case should be affirmed and the appellees awarded damages.

Respectfully submitted,

C. E. H. MALOY,

Attorney for Appellees

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE CO. OF
PHILADELPHIA, PENNSYLVANIA, a corpo-
ration,

Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and
PAUL VOHL,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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PAUL VOHL,

Appellees.

No. 10938

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

QUESTION PRESENTED

The brief for the plaintiffs urges that this appeal raises the same question considered and decided upon the former appeal.

On the former appeal the question raised was whether the first count of the plaintiffs' amended complaint (which incorporated the Builders' Risk Policy) stated a cause of action or claim upon which relief could be granted as against motion to dismiss.

On this appeal the question raised is whether, considering the plaintiffs' amended complaint (which incorporated the policy), the defendant's second amend-

ed answer, the depositions, and the plaintiffs' admissions on file when the motion for summary judgment was determined, there was no genuine issue as to any material fact (except only as to the amount of damages).

On the former appeal the defendant contended that the provisions of the policy—considered alone—plainly disclosed the purpose to limit the insurance to materials assembled in or intended for the vessel against risks in, of and about the facilities at Tacoma used for the building thereof at the time and place of the work. In short, the defendant then contended that the policy was itself unambiguous in negating coverage of materials in Seattle.

On this appeal the defendant contends that the policy—considered with and explained by the agreement for building Hull No. 20—plainly discloses a purpose to limit the insurance to materials at Tacoma assembled in or destined for the construction of the vessel. In other words, the defendant now contends that the policy, aided interpretively by the building contract, is unambiguous in negating coverage of materials in Seattle never intended for the vessel construction.

The question on the former appeal arose under F. R.C.P. Rule 12; the question on this appeal arises under F.R.C.P. Rule 56. The question on the former appeal was necessarily based upon the policy alone; the question on this appeal is necessarily based upon the policy, upon the building contract, and upon the plaintiffs' admissions relative to both.

The contention of the defendant on the former ap-

peal emphasized the locality of the materials destroyed as not being in Tacoma but in Seattle. The contention of the defendant on this appeal emphasizes the use of the materials destroyed as not being for the construction of Hull No. 20 but for its operation after completion.

The only similarity between the former appeal and the present appeal is that in each the defendant maintains that the plaintiffs have failed to show as a matter of law on the record that they are entitled to recovery upon the Builders' Risk policy in suit.

NO FACTUAL ISSUE

The brief of the plaintiffs (p. 13) says that the main question to be settled presently is whether, when the defendant's motion for summary judgment was submitted, there was any genuine issue of material fact appearing of record from the first count of the amended complaint, the denials of the second amended answer, the admissions of the plaintiffs under Rule 36 and the two depositions. The brief for the plaintiffs (p. 13) asserts that judicial ruling upon such a motion is a matter of search for the existence of an issue, not search for the determination of an issue. So far the defendant agrees.

However, as analyzed by the defendant's opening brief, the record at the time the motion for summary judgment was considered in the District Court shows the existence of no genuine issue of material fact within Rule 56(c). And the arguments of the plaintiffs' answering brief fail to uncover the presence of

any such factual issue on the record as then composed.

To the principal "question to be determined" as conceded by the plaintiffs' brief (p. 13), it devotes scant discussion and small space (pp. 16-19).

The plaintiffs' brief merely observes that the amended complaint alleged and the second amended answer denied "that there is due and owing to the plaintiffs from the defendant the sum of \$14,160.14" (p. 17). This observation is not followed by comment that thus was created any such factual issue as to excuse the lower court's refusal of summary judgment to the defendant. And that conclusion could not be soundly advanced against the clause in Rule 56(c) which expressly authorizes a summary judgment if there is no genuine issue of fact "except as to the amount of damages."

Again the plaintiffs' brief simply notes that the amended complaint alleged and the second amended answer denied "that the property (consumed by fire) listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy" (p. 17). But nothing is added to show that thus was joined a "genuine issue" of "material fact" such as to warrant the lower court's withholding from the defendant the summary judgment sought. Of course the reason is that in essence the allegation was a bald legal proposition. Actually the allegation was pure surplusage in the amended complaint, which (apart from jurisdictional elements) needed to set up only the ownership, description, location, purpose and value of the property and the

issuance for consideration of the policy incorporated thereby. Differently characterized, the plaintiffs' allegation was a misplaced prayer for a final, favorable judicial conclusion—the plaintiffs' ultimate contention. If the defendant's denial of such an allegation is to be held to justify the lower court's denial of summary judgment, such a ruling must be based upon this Court's denial of much meaning in the purposeful expression "genuine issue" of "material fact," used in Rule 56(c).

Further the plaintiffs' brief (p. 17) inserts between quotations of allegations in the amended complaint and of denials in the second amended answer, citations of Rule 8 and Forms 1 to 12 F.R.C.P. For what useful purpose does not appear, since neither Rule 8 nor Forms 1 to 12 support plaintiffs' contention that such allegations, coupled with such denials, raised any genuine issue of any material fact.

"The books" overflow with authority supporting the defendant's contention that its denial of the plaintiffs' allegation that the property lost by fire "was covered" by the policy incorporated by the amended complaint raised no factual issue because the allegation was a conclusion of law. A few citations should suffice.

"Generally allegations as to the construction and effect of a contract * * * are held to be conclusions of law."

49 C.J. 53, 54.

"No issue of fact is raised by a denial of a mere conclusion of law arising from the pleaded facts."

49 C.J. 783.

"The contract being set out, it must speak for

itself, and the demurrer does not admit the pleader's legal conclusions concerning it. The court must construe its effect independently of the pleader's interpretation of it."

Lawson v. Sprague, 51 Wash. 286, 290; 98 Pac. 737.

In the pleading "all the facts are set forth, so that the conclusion of the pleader is unimportant."

In re Marron Mfg. Co., 1 F.(2d) 903, (C.C. A. 7).

"The statement as to the understanding of the parties as to the meaning of language used in the written instruments, unaccompanied by an allegation as to what was said or done in that connection, discloses the mere opinion or conclusion of the pleader."

U. S. Shipping Board, etc. Corp. v. Galveston, etc. Co., 13 (F.(2d) 607, 610 (C. C.A. 5).

From the opinion by Mr. Justice Brandeis in a case where a petition was dismissed upon a demurrer, it appears that the petition pleaded the text of a contract involved, including section 3 thereof. Concerning the pleader's conclusions by way of interpretation of the contract, the opinion for the Supreme Court said:

"The petition alleges, among other things, 'that section 3 thereof does not contain and was not intended to contain any receipt or acknowledgment of any consideration by or in favor of the plaintiff for the use of said railroad property during said six months from January 1 to July 1, 1918;' that the section refers only to other provisions; and that the 'plaintiff gained nothing

by the execution of this contract, and by it no rights were lost.' The contention is that these allegations are admitted by the demurrer; and that for this and other reasons section 3 cannot properly be construed to apply to claims of the character of those sought to be recovered, because these 'did not arise out of the contract, or because of anything contained in it.' The allegations in the petition as to the meaning, application, and effect of section 3, being conclusions of law, are not admitted by the demurrer. *United States v. Ames*, 99 U.S. 35, 45, 25 L. ed. 295, 300; *Chicot County v. Sherwood*, 148 U.S. 529, 536, 37 L. ed. 546, 549, 13 Sup. Ct. Rep. 695; *Equitable Life Assur. Soc. v. Brown*, 213 U.S. 25, 43, 53 L. ed. 682, 689, 29 Sup. Ct. Rep. 404. The legal effect of the instrument remains that which its language imports."

St. Louis, Kennett, etc. Co. v. U. S. A., 267 U. S. 346, 69 L. ed. 649, 650.

In concluding discussion upon the primary question of whether the record contained a genuine factual issue, plaintiffs' brief says that "under similar circumstances" (p. 17) this Court reversed a trial court for granting a summary judgment in *State of Washington v. Maricopa County*, 143 F.(2d) 871 (C.C. A. 9).

A review of this Court's opinion in that case shows no "similar circumstances" in the record except that a motion for summary judgment was involved. Very dissimilar circumstances were present in the former litigation, where the motion was based and resisted on contradictory affidavits, and the answer to the complaint contained affirmative allegations deemed to

be denied without reply. On such a contrasting record this Court found a factual issue, and hence, held the motion for summary judgment should have been denied.

However, the opinion of this Court in the case cited by plaintiffs' brief extends aid to the defendant's contention that in the search for a genuine issue of material fact conclusions of law are not controlling, by the observation that they "should have been disregarded." *State of Washington v. Maricopa County*, 143 F.(2d) 871, 872 (C.C.A. 9).

While the plaintiffs' brief (pp. 18, 19) cites additional decisions from other Circuits, it fails to show that they are any more parallel or applicable than the ruling of this Circuit just discussed.

Without more, the plaintiffs' brief (pp. 16-19) concludes argument to support their contention that the record presented a bona fide factual issue. In this portion of the brief they omit to mention that by its second amended answer the defendant denied:

"(in harmony with admissions made and filed in behalf of the plaintiffs herein) * * * that the property listed and described by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20." (R. 38)

But without argument to combat, the defendant reiterates that this "denial" is in truth and in law no real denial because it was a mere summary of the

binding admissions of record made by the plaintiffs in their response (R. 26-37) under Rule 36, whereby, in effect, the corresponding allegations of their amended complaint had been retracted. And it is fairly inconceivable that from this "denial" could this Court find a genuine issue of material fact when the plaintiffs' brief (p. 25) on the present appeal concedes that *none of the property lost "was intended to be used in the construction of the Hull."* In other words, this "denial" by the defendant not only raised no issue of fact below but it creates no issue of contention here.

The defendant's opening brief (p. 11) has already stated that it is not resting the weight of its position upon the two depositions of Wheelock and Stakset. The Stakset deposition (R. 43-89) was concerned solely with values—the amount of plaintiffs' loss or damages; and hence it is quite extraneous to the inquiry under Rule 56(c). The Wheelock discovery deposition (R. 89-119), taken at the instance of the plaintiffs, is relevant to the inquiry and wholly favorable to the defendant as to the insurance afforded to the builder of Hull No. 20 and the plaintiffs by the policy in suit. But as of the time when the lower court ruled upon the motion for summary judgment the testimony in the deposition was nowhere disputed.

There were no other depositions.

No affidavits were ever filed for or against the application for summary judgment.

Then where was the genuine issue of material fact? The plaintiffs' brief has failed to find one. The defendant submits there is *none*.

NO INSURANCE COVERAGE

To escape from the interpretive light cast upon the insurance policy by the construction agreement the plaintiffs' brief asserts that the record fails to show that either instrument made direct or express reference to the other. Based on this assertion the brief of plaintiffs (pp. 19-24) advances argument and cites cases to the effect that the two documents were not parts of one contract or of one transaction. However, the assertion is contradicted by the record, and hence, the cases cited are inapplicable.

The contract to build Hull No. 20 contained a clause by which it was "*agreed that first party shall procure Builders' Risk insurance the premium for which second party shall also pay.*" (R. 33)

The Builders' Risk policy insuring Hull No. 20 contained a clause under which the plaintiffs' right to recover and the defendant's obligation to pay were both to be calculated or measured by reference to the "completed contract price"; the clause provided that: "*In the event of loss the underwriters shall not be liable for a greater proportion thereof than the amount of this insurance bears to the completed contract price.*" (R. 22).

In other words, by the express terms of the two instruments the contract would have been breached without the issuance of the subsequent policy; and the amount of the recoverable loss and indemnity under the policy could not be determined without resort to the prior contract.

The plaintiffs' brief says the two documents were not parts of a single transaction. On the contrary,

from the two quoted provisions alone, it seems to the defendant that they were interlocking elements of the same transaction. And of this relationship the defendant's opening brief (pp. 15-18) has already extracted from the record further proof:

- (1) The parties to the contract were "Peter Petersen of Brown's Point, Tacoma, Washington, doing business as Marine View Boat Building Co." and "Oluf B. Hanney." (R.30) The assureds named in the policy were "Peter Petersen d/b/a Marine View Boat Building Co., builder, and Oluf B. Hanney, owner" (R. 17, 21, 22).
- (2) The building contract described its subject matter as follows: "The vessel herein contemplated shall be known and designated as Hull No. 20 during its construction." (R. 32) The Builders' Risk policy identified the subject of its insurance as follows: "Hull No. 20 (Being Built)" and "Hull No. 20, building at Brown's Point, Tacoma, Washington." (R. 18, 22)
- (3) "Hull No. 20" as referred to by the contract and as referred to in the policy was the same. (R. 29, 36, 37—the defendant's "Request for Admissions under Rule 36," Item (2)-f; the plaintiffs' answer (2)-f "Response to Request for Admissions under Rule 36").

Further to summarize from the text of the two documents and the admissions of the plaintiffs, the record shows:

- (1) That the parties to the contract and the named assureds in the policy were the same;
- (2) That "Hull No. 20" to be built and "Hull No. 20" to be insured were identical;
- (3) That the contract required the issuance of the

policy; and settlement under the policy necessitated a resort to the contract.

For these reasons the defendant repeats that the two instruments were interdependent parts of a single transaction. As so connected the applicable rules of interpretation not only permit but insist that the policy, if itself alone ambiguous, be clarified by the explanation contained in the contract.

“A writing is interpreted as a whole, and all writings forming part of the same transaction are interpreted together.”

Sec. 235(c), p. 319, “Rules Aiding Application of Standards of Interpretation”—Restatement of the Law of Contracts by American Law Institute.

“The principle that the instrument shall be considered as a whole applies when a transaction is incorporated in or evidenced by more than one writing, in which case all the writings are treated as if they were parts of one instrument and are considered together for the purpose of determining the meaning of the parties.”

17 Am. & Eng. Ency. of Law (2d), p. 9.

“Where a writing refers to another document, that other document, or so much of it as is referred to in it, is to be construed as a part of the writing. * * * It is usually said that the two writings together form one contract.”

2 Williston on Contracts, Sec. 628, p. 1211.

“Writings which are made a part of a contract by annexation or reference will be so construed. * * * Reference is sufficient without actual annexation.”

13 C.J. Sec. 488, p. 530.

“Where a writing itself contains a reference

to extrinsic matters, these matters may be shown for the purpose of explaining the writing.”

32 C.J.S., Sec. 960, p. 902.

“Matters contained in other writings which are referred to may be regarded as a part of the contract and may, therefore, properly be considered in the interpretation of the contract. * * * Several instruments constituting part of the same transaction must be interpreted together.”

12 Am. Jurisprudence p. 781, Secs. 245, 246.

“In determining the matter of the intention of the parties, plaintiffs propose that the court examine their application for the policy in suit. Defendants argue that inasmuch as the application is not made a part of the contract, it has no bearing and should not be considered. Among the cases cited to sustain plaintiffs’ theory is that of *Employers’ Liability Assurance Corp. v. Wasson*, 8 Cir., 75 F. 2d 749. So far as the opinion in that case discloses, the application was not made a part of the bond, but was considered by the court in ascertaining the intention of the parties to the insurance contract. From a reading of the cases cited by defendants, we do not believe there is any rule which precludes a court from an examination and consideration of the application for the purpose of determining the intention of the parties and this, irrespective of whether or not the application is a part of the contract.”

Paddleford v. Fidelity & Casualty Co., 100 F. (2d) 606, 611 (C.C.A. 7).

“It is elementary that the acceptance of the offer gave rise to an agreement, evidenced by the written application. It was perfectly competent

for the parties to make, as they did, the schedules of the company a part of the contract *by mere reference* to them. These documents were readily subject to identification, and there is no dispute here concerning either their existence or their terms. *Benson v. Metropolitan Life Insurance Co.*, 126 Wash. 125, 217 P. 709; *Green v. National Casualty Co.*, 87 Wash. 237, 151 P. 509; *Friedman v. Metropolitan Life Insurance Co.*, 250 App. Div. 195, 293 N.Y.S. 757." (Italics supplied)

Metropolitan Life Ins. Co. v. Henderson, 92 F.(2d) 891, 894 (C.C.A. 9).

In the Ninth Circuit opinion just quoted this Court cited a case entitled *Green v. National Casualty Co.*, 87 Wash. 237, 151 P. 509, involving an accident insurance policy, in the application for which some reference was made to the company's manual of hazardous occupations. The Washington Supreme Court held the manual should be examined to amplify and explain the policy, adopting from 9 Cyc. 582 language as follows:

"Where one paper refers to another for its terms, it is the same as though the words of the one referred to were inserted in the former."

Green v. National Casualty Co., 87 Wash. 237, 245, 151 P. 509.

The other Washington case cited by this Court in *Metropolitan Life Insurance Co. v. Henderson*, *supra*, gave effect to the principle that mere reference in an application for a contract to a schedule is sufficient to make it operative therein—*Benson v. Metropolitan Life Insurance Co.*, 126 Wash. 125, 217 P. 709.

In a further Washington case an owner of real

estate entered into an agreement to pay commission to a realtor "under the terms and conditions" of an earnest money receipt signed by both owner and purchaser, which was later cancelled. On a suit by the realtor for commission it was held:

"The contract sued on, since it refers to the other, is to be construed as if that other to that extent was incorporated in it, and the cancellation of the other, being between entirely different parties, in no way depreciates its value."

Lemcke & Co. v. Nordby, 117 Wash. 221, 223, 200 Pac. 1103.

The plaintiffs' brief (pp. 20-23) cites a number of decisions from Washington and other jurisdictions to sustain the legal proposition that a document or paper not mentioned by a contract does not become a part thereof. Since the Builders' Risk policy insuring Hull No. 20 expressly refers to the builder's contract the plaintiffs' proposition is inapplicable and most of such citations are inapplicable. This is definitely true as to the recent ruling of the Washington Supreme Court upon which plaintiffs seem especially to rely—*Laughlin v. March*, 19 Wn. (2d) 874, 145 P. (2d) 549, for the reason that the Court was there dealing with real property upon which it was sought to impose an express trust by oral testimony to connect a defective, formal, notarized declaration with an unsigned, unidentified scrap of paper not mentioned by the declaration itself.

It being established in fact and in law that the agreement to construct "Hull No. 20" and the policy to insure "Hull No. 20" were parts of the same transaction so that ambiguity in the latter should be explained by resort to the former, it becomes apparent

that the defendant was insuring Petersen as builder and Hanney, one of the plaintiffs, as owner of Hull No. 20 respecting materials, etc., at Tacoma, to the extent assembled in and destined for the *construction* of that contemplated vessel.

When the two documents are read together it becomes patent that the term "Hull No. 20" was accepted in the contract as the designation of all the property necessary to the construction of the contemplated vessel "to be complete in all respects," which was therein further particularly defined; and that the term "Hull No. 20" was adopted in the later policy to describe the same property for insurance coverage.

Examination of the two instruments also makes it clear that not only did they identify their common subject matter by the same arbitrary term of convenience but they valued the construction materials and the insured materials at the same figure—\$30,000 was the full purchase price of Hull No. 20 under the contract as completed by the builder, and \$30,000 was the final amount of insurance of Hull No. 20 under the policy as completion approached.

To push the plaintiffs into confession of the interdependent relationship between the contract and the policy the defendant made demand for certain admissions as authorized by Rule 36. Under such pressure the plaintiffs admitted:

(a) That full performance of the contract to construct Hull No. 20 as a vessel "complete in all respects" did not require from either party any of the

property lost by fire at Seattle—listed in plaintiffs' Exhibit B (R. 27, 29, 36, 37);

(b) That during the full performance of such contract and in the finished construction of the vessel thereunder there was not used *other similar substitute property*—listed in item “(2)-b” of defendant's Request for Admissions (R. 27, 28, 36).

These admissions were so forced by the defendant from the plaintiffs to disclose the categorical difference in character and purpose between the materials for construction to be supplied and collected at Tacoma by the builder to make Hull No. 20 “complete in all respects” under the contract, and the plaintiffs' paraphernalia, owned and burned at Seattle, to be used in fishing and operating the vessel after completion and delivery thereof. And the admissions having been painfully developed on the record, now plaintiffs' brief (p. 25) concedes the difference between the two classes of property both as to kind and intent by saying:

“An examination of the list of such gear and equipment (Rec. 23-25; Plaintiffs' Exhibit B) readily discloses that *none of such gear or equipment was intended to be used in the construction of the hull.*”

In the light of this concession it is clear why the brief of plaintiffs labors so heavily to exclude from this Court's interpretive thinking the builder's contract for the construction of Hull No. 20, for it becomes settled that the property destroyed by fire was outside the insurance coverage of the policy, not only because (as contended upon the first appeal) it was

located in Seattle, but also because (as contended upon this appeal) it was no part of the subject matter of the builder's contract and no part of the construction of Hull No. 20 which the builder was obligated to make a vessel "complete in all respects" (R. 32).

To epitomize, the defendant in this appeal stands on the proposition that the Builders' Risk policy as explained by the builder's contract was certain and unambiguous in its objective to insure materials as supplied and assembled at Tacoma for the construction and completion of Hull No. 20, but not to cover also other materials as stored in Seattle for the subsequent operation and fishing with the vessel after delivery.

In the defendant's view of the whole matter Hanney, one of the plaintiffs, wanted a fishing boat. To acquire it at a price of \$30,000 he made a contract with Petersen, a builder at Tacoma. By the contract, to protect himself, a performance bond was required; and to protect himself and the builder, an insurance policy was required. The penalty of the bond was set at \$30,000. The final amount of insurance was fixed at \$30,000. Hanney and his associate plaintiffs picked up some secondhand nets, gear, etc. for \$4000 (R. 46) at Seattle to use in fishing after the builder had finished the job and delivered the boat. A Seattle dock fire destroyed the fishing equipment. Claiming the property to be worth \$14,160.14 (R. 5) the plaintiffs have been in effect trying to obtain through this litigation the benefit of \$44,160.14 of insurance from the defendant, whose premium was calculated and paid upon a maximum risk of \$30,000.

With knowledge of this history, it is less than surprising that in this suit the defendant has sought to avoid a jury verdict dependent upon testimony from such plaintiffs, and still seeks to obtain a court decision interpreting its policy as a matter of law.

Before the first appeal the District Court held that the policy by itself, alone, negatived liability as a matter of law. On the first appeal this Court held the policy, unexplained, was obscure. After the first appeal the District Court in ruling upon the motion for summary judgment doubtless felt constrained to hold a trial in deference to this Court's possible desire that a second appeal conclude the litigation in any event. However, on the present appeal this Court will be under no like embarrassment. Hence, the defendant urges that the Builders' Risk policy as explained by the builder's contract be searchingly scrutinized, since it is the defendant's conviction that as interpreted together the policy and the contract show as a matter of law that the defendant is not liable.

Of course the plaintiffs' brief protests that if summary judgment be granted on the defendant's motion the result will have deprived the plaintiffs of their right to a jury trial. In reply the defendant merely cites the text of Rule 56, which, in effect, declares that the plaintiffs have no such right, since the record presented no genuine issue of material fact when the motion was submitted, and the trial court then was and this Court now is faced with an unadulterated question of law, since the Builders' Risk policy as supplemented by the builder's contract was unambiguous

in negating the insurance coverage asserted against it. Therefore, the District Court should be reversed.

Respectfully submitted,

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